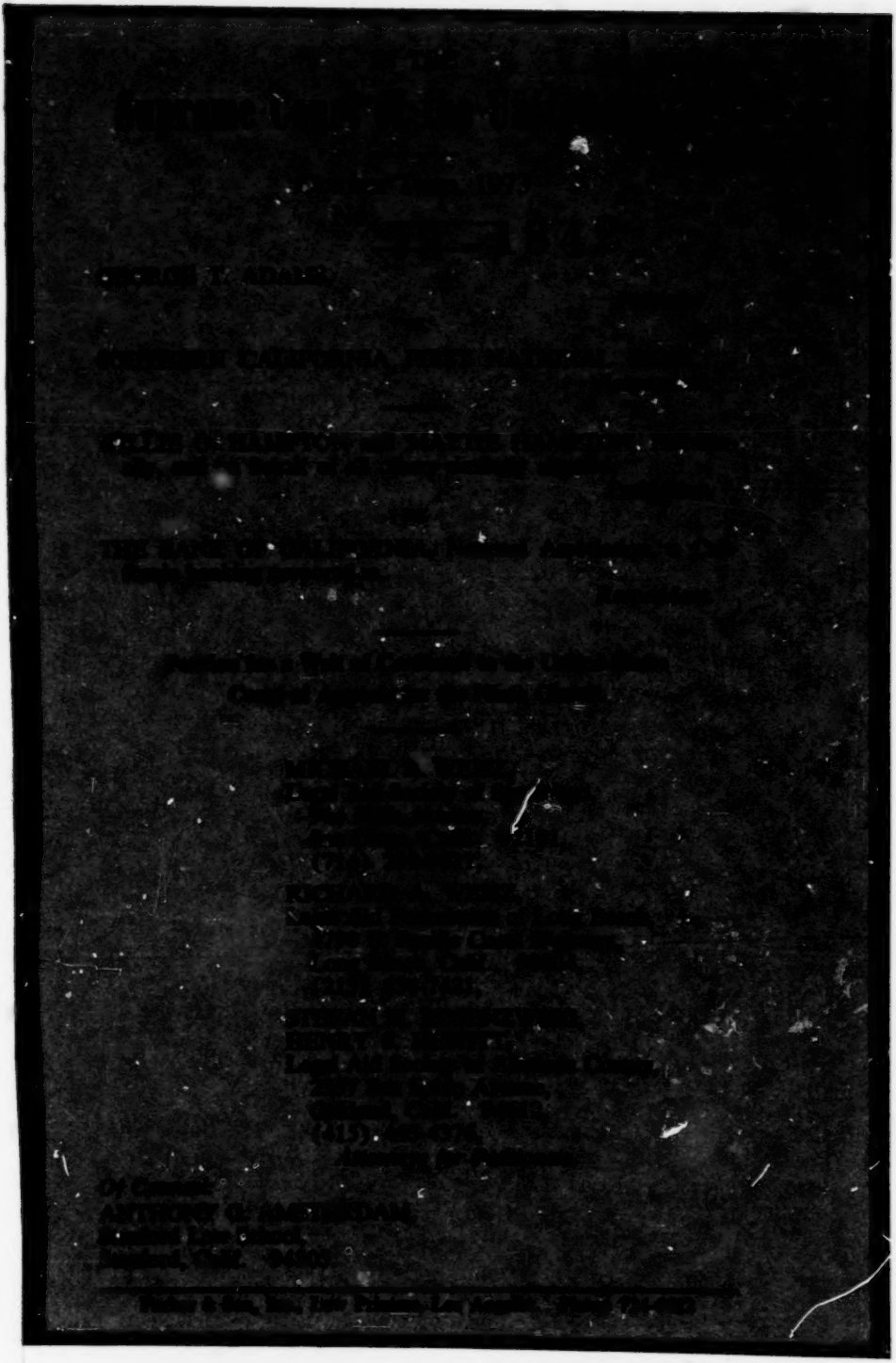

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

GEORGE T. ADAMS,

Petitioner,

vs.

SOUTHERN CALIFORNIA FIRST NATIONAL BANK,

Respondent.

WILLIE O. HAMPTON and MATTIE HAMPTON, Individually, and on behalf of all others similarly situated,

Petitioners,

vs.

THE BANK OF CALIFORNIA, National Association, a California banking corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, George T. Adams, Willie O. Hampton and Mattie Hampton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these cases on October 4, 1973.

Opinions Below.

The opinion of the Court of Appeals and the dissenting opinion of Byrne, J., reported at 492 F. 2d 324 (9th Cir. 1973), is attached to this petition as Appendix A. The order of the Court of Appeals, on suggestion of *en banc* consideration and the dissenting

opinion of Hufstedler, J., also reported at 492 F. 2d 324 (9th Cir. 1973), is attached as Appendix B. The opinion of the United States District Court for the Southern District of California in *Adams v. Southern California First National Bank*, reported as *Adams v. Egley, et al.*, at 338 F. Supp. 614 (S.D. Cal. 1972), is attached as Appendix C. The order of the United States District Court for the Northern District of California in *Hampton v. The Bank of California*, which is not reported, is attached as Appendix D. The order in *Hampton, supra*, incorporates the decision in *Oller v. Bank of America*, reported at 342 F. Supp. 21 (N.D. Cal. 1972), attached as Appendix E.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 4, 1973. A timely petition for rehearing *en banc* was denied on March 12, 1974, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the extrajudicial repossessions of debtors' property, as expressly authorized and governed by California's statutory repossession scheme which promotes significant state interests by delegating state power to ostensibly private parties, constitutes state action within the Fourteenth Amendment and action under color of state law within Rev. Stat. Sec. 1979, 42 U.S.C. §1983.

2. Whether the California statutory repossession scheme violates the due process clause of the Four-

teenth Amendment by reason of its failure to require any of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company*, ... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974), including the institution of judicial proceedings with an opportunity to be heard before the debtor is finally deprived of property.

Constitutional and Statutory Provisions Involved.

The following constitutional and statutory provisions involved in these cases are set forth in Appendix F:

(1) U.S. Constitution, Amendment XIV, §1.

(2) Rev. Stat. Sec. 1979, 42 U.S.C. §1983 (hereinafter 42 U.S.C. §1983).

(3) California Business and Professions Code §§7520, 7521(e), 7522 and 7538.2.

(4) California Civil Code §§2982(a)(10)(4), 2983.2 and 2983.3.

(5) California Commercial Code §§9501, 9503 and 9504(1) and (2).

(6) California Vehicle Code §§28, 5600, 5601, 5602, 5909 and 9561.

Statement of the Case.

On June 17, 1968, petitioner, George T. Adams "[i]n need of money for medical bills . . ." (Pet. App. p. 3) borrowed $1,000 from the Bank of La Jolla (predecessor in interest to respondent, Southern California First National Bank). The Bank required Adams to execute a promissory note to repay a total of $1,160.16 and a standard form security agreement drafted in conformity with California Commercial Code

(hereafter "Comm. Code") §§9503[1] and 9504, giving the Bank a security interest in his three motor vehicles —a 1959 Volkswagen van, a 1960 Volkswagen sedan, and a 1961 Volkswagen sedan.[2]

By August, 1970, Adams had repaid over $900.00 of his loan. On August 19, the Bank, having concluded that Adams was in default, caused the nighttime repossession of the 1959 van and the 1960 sedan pursuant to Comm. Code §9503. The repossession was accomplished by Richard Egley, a state licensed repossessor. In the course of the repossession, several items of personal property contained in the vehicles, not covered by the security agreement, were also taken. These items included a municipal business license, a county medical card, a county food supplement identification card, educational materials, and miscellaneous tools.[3]

The two repossessed vehicles were subsequently sold at a private sale by the Bank pursuant to Comm. Code §9504. "After deducting costs of repossession and storage of the vehicles from the proceeds of a private sale,

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[1]Comm. Code §9503 provides in pertinent part:
"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

[2]The contract contained the following language:
"upon the occurrence of any such event of default the *Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code* [Cal. Comm. Code §§9501 et seq.]. . . . Upon the occurrence of any event of default the Secured Party is entitled to take possession of the vehicle . . . and to take such other measures as Secured Party may deem necessary for the protection of the vehicle. . . ." Pet. App. p. 4 (emphasis added).

[3]These items were returned some six weeks after their seizure.

the net recovery amounted to $219.15. This amount when applied against the balance due resulted in a deficiency of less than $1.00 which was cancelled."[4] Pet. App. p. 5.

Petitioner, Willie O. Hampton, purchased a 1967 Buick on September 3, 1969, pursuant to a retail installment contract "which was assigned to [respondent] The Bank of California . . ., and which called for 30 monthly payments of $118.30, or a total of $3,549." Pet. App. p. 5. The contract contained default and repossession provisions drafted in conformity with California Civil Code (hereafter "Civil Code") §2982(a)(10)(4). After making payments for nearly two years, Hampton was allegedly late in submitting his payment for August, 1971. Hampton alleged "that the Bank agreed that he could make up the missed payment at a later date, so long as he kept current on the rest of his payments." Pet. App. pp. 5-6. The next payment was made, but returned to him, and in apparent violation of the agreement, the Bank, pursuant to Comm. Code §9503 and Civil Code §§2981 *et seq.*, repossessed the vehicle "during the night of October 14, 1971."[5] The Bank subsequently mailed Hampton a notice of its intent to sell the automobile (Civil Code §2983.2) unless the contract balance plus collection charges of $946.89 were paid.

Both Adams and Hampton commenced suits in the appropriate federal district courts challenging the con-

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[4]Adams alleged in his complaint that at the time of the sale, the van had a fair market value in excess of the balance of all claims due under the contract and additional costs incurred on repossession and resale.

[5]The record reveals that the repossession actually occurred on October 4, 1971.

stitutionality of the statutory repossession procedures[6] employed by their respective creditors.[7]

On October 23, 1970, Adams filed suit in the Southern District of California seeking damages and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.[8] On February 11, 1972, the district court granted Adams' motion for partial summary judgment and held Comm. Code §§9503 and 9504 invalid on their face as violative of the Fourteenth Amendment's due process clause. The Bank filed a petition for interlocutory appeal, 28 U.S.C. §1292(b), which was granted by the Court of Appeals on March 15, 1972.[9]

On October 18, 1971, Hampton commenced a class action in the Northern District of California seeking injunctive and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202.[10] After issuing a temporary restraining order on October 18, 1971, the court, on its own motion, dismissed the action on March 3, 1972, holding that the court lacked

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[6]*Adams* challenged Comm. Code §§9503 and 9504; *Hampton* challenged Comm. Code §9503 and Civil Code §§2982(a)(10)(4), 2983.2 and 2983.3.

[7]Named as defendants in *Adams* were Richard Egley, dba Egley's Recovery Service and Southern California First National Bank; and in *Hampton*, The Bank of California.

[8]Adams invoked the jurisdiction of the court under 28 U.S.C. §§1331 and 1343.

[9]Defendant Egley did not appeal from the district court decision.

[10]Hampton invoked the jurisdiction of the court under 28 U.S.C. §1343.

subject matter jurisdiction. Hampton then appealed from this decision.

The Court of Appeals for the Ninth Circuit consolidated the *Adams* and *Hampton* cases on appeal in an order dated December 15, 1972. On October 4, 1973, a divided panel of the Court of Appeals reversed in *Adams* and affirmed in *Hampton*[11] holding that the state was "not so significantly involved" (Pet. App. p. 8) in the challenged repossession procedures as to sustain a claim under 42 U.S.C. §1983 and the Fourteenth Amendment. A petition for rehearing with suggestion for rehearing *en banc* was timely filed, and denied on March 12, 1974, Judge Hufstedler dissenting.

[11]In affirming *Hampton* the court noted that the proper ground for dismissal was "failure to state a federal cause of action, rather than that the federal court lacked subject matter jurisdiction. *Bell v. Hood*, 327 U.S. 678 (1946)." (Pet. App. p. 28).

REASONS FOR GRANTING THE WRIT.

I.

Review by This Court Is Necessary to Settle Important Issues of Federal Law.

Petitioners challenge California's repossession statutes which require none of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company*, ... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974). Substantially identical repossession procedures have been enacted in virtually every state.[12] Their manifest inadequacies have generated a nationwide attack on the constitutional validity of extrajudicial repossession in both federal and state courts.[13] The result has been a proliferation of decisions which, for the most part, have failed to come to grips with the due process issue because of a supposed lack of state action in the repossession process.

Decisions have been rendered in the United States Court of Appeals for the Ninth Circuit, in the cases *sub judice;* the Eighth Circuit, *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 906 (8th Cir. 1973); *Nowlin v. Professional Auto Sales, et al.*, ... F. 2d ...., Nos. 73-1348, 73-1450 (8th Cir. Apr. 25, 1974); *Nichols v. Tower Grove Bank*, ...

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[12]McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. Cal. L. Rev. 58, 75 (1973).

[13]Counsel are aware of at least 45 cases challenging extrajudicial repossession. These cases are set forth in Appendix G. *Adams* has been the topic of discussion in approximately 35 law review articles, comments and notes. *See, e.g.*, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditors Meet the Constitution*, 59 Va. L. Rev. 355, 372-383; Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. Fla. L. Rev. 60, 107-140; and Symposium, Creditors' Rights, 47 S. Cal. L. Rev. (1973).

F. 2d ...., No. 73-1621 (8th Cir. May 13, 1974); and the Second Circuit, *Shirley v. State National Bank of Connecticut*, ...F. 2d ...., No. 73-1783 (Feb. 14, 1974), *petition for rehearing en banc denied*, ... F. 2d .... (2nd Cir. March 29, 1974).

Decisions are pending in the Fifth Circuit, *James v. Pinnex*, No. 72-1250 (S.D. Miss. Dec. 21, 1972), *appeal docketed*, No. 73-1866 (5th Cir. Apr. 17, 1973); *Baker v. Keeble*, 362 F. Supp. 355 (M.D. Ala.), *appeal docketed*, No. 73-3631 (5th Cir. Nov. 7, 1973); the Third Circuit, *Gibbs v. Titleman, et al.*, 369 F. Supp. 38 (E.D. Pa. 1973), *appeal docketed*, Nos. 74-1062-1067 (3rd Cir. Jan. 15, 1974); and the Sixth Circuit, *Turner v. Impala Motors*, No. C-73-50 (W.D. Tenn.), *appeal docketed*, No. 73-1826 (6th Cir. Aug. 15, 1973).[14]

The opinions of the courts of appeals in *Adams*, *Bichel*, *Nowlin*, *Nichols*, and *Shirley* are marked by a failure to articulate and apply meaningful principles of state action. Rather, the decisions rest on artificial and superficial distinctions which ignore the expansive thrust of this Court's prior decisions. Thus, the instant cases present significant constitutional issues which affect a wide range of cases involving the conduct of ostensibly private parties.[15]

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[14]The district courts in *James v. Pinnex*, *supra*, and *Gibbs v. Titleman*, *supra*, found that the state was significantly involved in the repossessions and held the respective statutory schemes unconstitutional.

[15]*See e.g. Ouzts v. Maryland National Insurance Company*, 470 F. 2d 790 (1972), *vacated for rehearing en banc*, No. 26062 (9th Cir. June 20, 1973) (bail bondsmen's violation of alleged fugitive's due process rights); *Bond v. Dentzer*, ... F. 2d ...., 42 U.S.L.W. 2502 (2nd Cir. Mar. 13, 1974) (upholding New York's extrajudicial statutory wage assignment scheme);

(This footnote is continued on next page)

Recognizing the importance of these issues, the Court has recently granted a petition for a writ of certiorari in *Jackson v. Metropolitan Edison Company*, 483 F. 2d 754 (1973), *cert. granted*, ... U.S. ...., 94 S. Ct. 1407 (1974).[16] *Jackson* presents the state action and due process issues in the context of a publicly regulated utility company's extrajudicial termination of a customer's electrical service. The instant cases pose issues that are like, but not identical to, those in *Jackson*. In order for the Court to get a well-rounded and comprehensive view of these issues and their ramifications, this petition should be granted and these cases set down for argument along with *Jackson*.[17] This would enable the Court to provide instructive general principles to guide the lower courts in resolving questions of state action where ostensibly private parties act in varying contexts pursuant to state regulations designed to promote state policies and interests.

Hall v. Garson, 430 F. 2d 430 (1970), 468 F. 2d 845 (5th Cir. 1972) (invalidating Texas' landlord lien statute); *Adams v. Department of Motor Vehicles*, ... Cal. 3d ...., 113 Cal. Rptr. 145 (1974) (invalidating, in part, California's extrajudicial garagemen's labor and materials lien and sale procedure); and *Barrera v. Security Building and Investment Corp.*, No. 73-B-34 (S.D. Tex. May 3, 1974) (rejecting due process challenge to extrajudicial real property foreclosure statutes).

[16]The Court has also granted a petition for a writ of certiorari in *North Georgia Finishing, Inc. v. Di-Chem, Inc., petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 18, 1974), *cert. granted*, ... U.S. .... (No. 73-1121, May 28, 1974), which presents the due process issue in the context of the prejudgment garnishment of a debtor's bank account.

[17]In *Gonzales v. Automatic Employees Credit Union*, 363 F. Supp. 143 (N.D. Ill. 1973) *question of jurisdiction postponed to the hearing on the merits*, ... U.S. ..., 94 S. Ct. 1467 (1974), appellant's challenge to Illinois' repossession statutes is not clearly presented, as the case involves complicated procedural issues.

II.

The Decision of the Court of Appeals Is Erroneous and in Conflict With Applicable Decisions of This Court.

The matter before the Court concerns detailed state laws and policies which significantly involve the state in objectionable conduct of ostensibly private parties. By focusing on the state's role in such conduct, this Court has developed an expansive body of state action law subjecting so-called private conduct to constitutional scrutiny. The Court has sought to evaluate significant state policies and interests that intrude into private relationships and are reflected in particular conduct. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

By a process of "sifting facts and weighing circumstances"[18] the Court has decided the state action issue in a manner which reflects differing emphases of a singular unifying theme:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of Law.[19]

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[18]*Burton, supra*, 365 U.S. at 722.

[19]This theme is apparent in each of the following approaches to the state action issue employed by the Court: (1) private parties whose conduct is subject to pervasive state regulation. *Public Utilities Comm'n v. Pollak, supra; Burton v. Wilmington Parking Authority, supra; Moose Lodge No. 107 v. Irvis, supra; Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Nixon v. Condon*, 286 U.S. 73

(This footnote is continued on next page)

An examination of the statutory scheme structuring and governing repossession reveals that California has intertwined state policies with ostensibly private conduct:

1. By legislative enactment California authorizes secured creditors to unilaterally determine default and repossess collateral "without judicial process." Comm. Code §9503.

2. The challenged statutes effectively write the default provisions of the security agreement and govern the actual manner of repossession; *i.e.*, Comm. Code §9503 requires repossession "without breach of peace"; Comm. Code §9504 (and Civil Code §2983.2) require that a notice of resale must be sent to the debtor and that the repossessed goods must be sold in a "commercially reasonable manner." Civil Code §2982(a)(10)(4) requires that an automobile retail installment contract must contain a notice to the buyer that upon "default", the vehicle may be repossessed.

3. Repossession is accomplished by state licensed and regulated repossessors. Bus. and Prof. Code

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(1932); (2) private action involving the performance of traditional public functions delegated to private individuals. *Smith v. Allwright, supra; Terry v. Adams, supra; Nixon v. Condon, supra; Evans v. Newton,* 382 U.S. 296 (1966); *Marsh v. Alabama,* 326 U.S. 502 (1946); *United States v. Williams,* 341 U.S. 97 (1950); (3) private action encouraged or compelled by state law and reflecting current state policy. *Reitman v. Mulkey, supra; Adickes v. S. H. Kress & Company,* 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis, supra; Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Lombard v. State of Louisiana,* 373 U.S. 267 (1963); *Robinson v. Florida,* 378 U.S. 153 (1964); *Nixon v. Condon, supra; McCabe v. Atchison, Topeka & Santa Fe R. Company,* 235 U.S. 151 (1914); *Evans v. Abney,* 396 U.S. 435 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948); and (4) private action taken with reliance on state law, custom or usage. *Adickes v. Kress, supra; Evans v. Abney, supra.*

§§7520, 7521(e) and 7522. When property not covered by the security agreement is taken in the course of the repossession, California law requires the repossessor to inventory these goods. Bus. and Prof. Code §7538.2.

4. Vehicle Code §28 requires that the repossessor immediately notify the local police of the occurrence of a repossession.

5. The California Department of Motor Vehicles automatically transfers title of a vehicle to the creditor, after repossession, without the necessity of the debtor's signature on the "pink slip". Vehicle Code §§5600, 5601, 5602, 5909, and 9561.

6. The challenged statutes authorize deficiency judgments as an integral part of the repossession scheme. Comm. Code §9504 and Civil Code §2983.2. This grant of cumulative remedies (Comm. Code §9501) to the conditional seller did not exist at common law. *Johnson v. Kaeser*, 196 Cal. 686, 239 Pac. 324, 327 (1925).[20]

Significant governmental interests and policies are promoted by this statutory scheme. They were perceptively identified by Circuit Judge Hufstedler, dis-

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[20]The court of appeals' conclusion that the state is not significantly involved (Pet. App. p. 8) in repossession is simply a characterization that ignores the real world. Secured creditors organize their business practices in conformity with statutory requirements, and the debtor is stymied at every turn by creditor conduct backed by the force of law.

The existence of a contract, with its common law heritage, does not deter a finding of state action. For the contract itself is shot through with binding statutory requirements, and state action analysis must focus on the state's role in the objectionable conduct. *See New York Times v. Sullivan*, 376 U.S. 254, 265 (1964); *Reitman v. Mulkey, supra.*

senting from denial of rehearing *en banc* in the instant cases:

> "California is not a neutral bystander in a contest between these private debtors and creditors. The economy of the state has become heavily dependent on the automobile industry in all its parts, an essential feature of which is consumer credit secured by interests in automobiles. California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduces the creditors' costs of repossession, for the evident purpose of stimulating the flow of consumer credit for the benefit of the state's economy, at the expense of those whose automobiles are summarily seized. Thus, the automobile-secured credit industry in California has become a state instrumentality through which California seeks to generate public benefits. Of greater moment in this state action context, however, is that California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasijudicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees." Pet. App. pp. 37-38.

California's comprehensive pattern of regulation delegates specific governmental functions to secured creditors in furtherance of the previously identified state

interests. The statutory scheme effectively confers the essentials of both judicial and police power on the secured creditor. He is expressly empowered to act as an arbiter of disputes and seize goods as if in the execution of a judgment. When the state abdicates these roles to so-called private persons, in the interest of economy, these functions still retain all of the characteristics of an act of the state. *Evans v. Newton,* 382 U.S. 296, 299 (1966); *cf., United States v. Williams,* 341 U.S. 97 (1950); *United States v. Price,* 383 U.S. 787 (1965); *United States v. Guest,* 383 U.S. 745 (1965).[21]

The foregoing analysis demonstrates that significant state interests have been implemented through a pervasive statutory framework delegating state power to private individuals. Their resultant conduct has the force of law and is subject to constitutional scrutiny.[22]

Had the court below reached the due process issue, the fate of California's repossession statutes would be sealed. None of the procedural safeguards enunciated by this Court in *Mitchell v. W. T. Grant Company,* .... U.S. ...., 42 U.S.L.W. 4671 (May 13, 1974) are

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[21]The relationship between the repossession statutes and the function delegated thereby was analyzed by Judge Hufstedler:

> "The more pervasive is the regulation, the more likely is the regulated enterprise performing a function of the state. Demonstration of governmental interest, rather than the particular nature or history of the specific activity, is the public function indicium." Pet. App. p. 36 (footnotes omitted).

[22]The court of appeals' suggestion that non-race cases are subjected to a stricter state action test (Pet. App. pp. 16-18) is not supported by the decisions of this Court. *See Public Utilities Comm'n v. Pollack, supra; United States v. Williams, supra; Railway Employes' Dept. v. Hanson,* 351 U.S. 225 (1956); *Lathrop v. Donahue,* 367 U.S. 830 (1961); and *Marsh v. Alabama, supra.*

required by the challenged provisions. The Louisiana sequestration procedures upheld in *Mitchell* specifically required:

1. That the creditor institute a possessory action against the debtor with an opportunity for hearing before final resolution of the dispute. 42 U.S.L.W. at 4672.

2. That a writ of sequestration would issue only on a clear showing of narrowly confined facts, *i.e.*, the debt, lien, and delinquency. 42 U.S.L.W. at 4674.

3. That this showing be made by affidavit or verified petition. 42 U.S.L.W. at 4673.

4. That this showing be made before a judge. *Id.*

5. That a writ would issue only after the filing of a sufficient bond to protect the debtor against improvident issuance of a writ. *Id.*

6. That the debtor be afforded an opportunity for an immediate hearing by means of a motion to dissolve the writ. The creditor retained the burden of proof, and if the debtor was successful, damages and attorney's fees could be awarded. *Id.*

7. That the debtor be afforded the opportunity to immediately regain possession by filing his own bond. *Id.*

By comparison, the California statutes abrogate our most basic conceptions of due process. Midnight raids on debtors' property substitute for the rule of law.

Conclusion.

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

George T. Adams, Plaintiff-Appellee, vs. Southern California First National Bank, Defendant-Appellant. No. 72-1484.

Willie O. Hampton & Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, vs. The Bank of California, National Association, a California banking corporation, Defendant-Appellee, No. 72-1888.

[October 4, 1973].

Appeals from the United States District Courts for the Southern and Northern Districts of California.

Before: CHAMBERS and TRASK, Circuit Judges, and BYRNE,* District Judge.

TRASK, Circuit Judge:

These two cases present appeals from contrary results reached by two district courts on the question of the constitutional due process rights of debtors whose property is repossessed by self-help, without formal legal proceedings.

The *Adams* case is before this court on an interlocutory appeal by the Southern California First National Bank (S.Cal. Bank) from an order of the Dis-

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*Honorable William M. Byrne, Sr., United States District Judge for the Central District of California, sitting by designation.

trict Court of the Southern District of California granting Adams' motion for partial summary judgment.[1]

The trial court concluded first that the enactment of sections 9503 and 9504[2] of the California Commercial Code set forth a state policy constituting sufficient state action "to raise a federal question" under the provisions of the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3). From that position it concluded that the repossessions denied the plaintiffs their constitutional rights and that sections 9503 and 9504 "which provide for such tak-

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[1]In the District Court, the *Adams* case was consolidated with *Posadas v. Star & Crescent Federal Credit Union* upon a stipulation to decide the single issue of declaratory relief. Both Adams and Posadas filed a motion for partial summary judgment which was granted by the trial court, and it is from that order that this appeal arises. The controlling question of law certified by the trial court is one affecting both cases, and although the record is unclear, this appeal would appear to affect and control the disposition of both *Adams* and *Posadas*. The trial court's opinion is reported at 338 F. Supp. 614 (S.D. Cal. 1972).

[2]Section 9503 provides in pertinent part,

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504."

Section 9504 provides in pertinent part,

"(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .

* * *

"(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . ."

ings" are constitutionally invalid.[3] This court has jurisdiction under 28 U.S.C. § 1292(b), the trial judge having certified that his order involves a controlling question of law, and a panel of this court having granted leave to appeal.

The controlling questions of law are whether the repossession of motor vehicles by self-help on default of a payment contract which provides for such repossession, is an act under color of state law, and thus gives rise to a claim under 42 U.S.C. § 1983, in view of the provisions of sections 9503 and 9504 of the California Commercial Code and is thus state action within the meaning of the Fourteenth Amendment; and whether such sections are unconstitutional as state action which authorizes summary repossession without affording due process.

The *Hampton* case involves an appeal from an order of the District Court for the Northern District of California dismissing appellant's complaint challenging the prejudgment summary repossession procedure for lack of jurisdiction over the subject matter. The appeal from the decision in the consolidated cases from the Southern District was joined with the appeal from the decision of the Northern District in this court.

Plaintiff-appellee Adams had been a continuous resident of California for nearly 48 years, and of San Diego for nearly eight years prior to the initiation of this action. While residing in San Diego, Adams had maintained a good credit record. In need of money for medical bills, on June 17, 1968, Adams borrowed $1,000 from the Bank of La Jolla (predecessor in interest to the S.Cal. Bank). In return for the loan,

[3] 338 F. Supp. at 618.

Adams executed a promissory note to repay $48.44 per month, for a total of $1,160.16, and a security agreement giving the bank a security interest in three vehicles—a 1961 VW sedan, a 1960 VW sedan, and a 1959 VW van. The security agreement contained the following language:

> "Should Debtor fail to make payment of any part of the principal or interest, as provided in said promissory note . . . the whole principal sum unpaid upon said promissory note with interest accrued thereon, . . . shall immediately become due and payable at the option of the Secured Party. Upon the occurrence of any such event of default Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or any other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicles. . . ."

Between July, 1968 and October, 1970, Adams experienced three job changes and intermittent unemployment. By January 22, 1970, Adams had repayed nearly $900 of the loan. On this date he became unemployed, and a further payment was not made on his loan until July 7. Between July 25 and August 17, 1970, Adams and representatives of the S.Cal. Bank discussed the status of his loan, which at that point in time had an outstanding balance of $217.45.

On August 17, 1970, the decision was made by the S.Cal. Bank to take possession of the vehicles covered by the security agreement, and at some time between 5:00 p.m. on August 19 and 7:00 a.m. on August 20, Richard Egley, a repossessor licensed by the State of California, took the 1959 van and the 1960 sedan from Adams' possession.[4]

After deducting costs of repossession and storage of the vehicles from the proceeds of a private sale, the net recovery amounted to $219.15. This amount when applied against the balance due resulted in a deficiency of less than $1.00 which was cancelled.

On October 23, 1970, Adams filed suit in district court against the S.Cal. Bank and Richard Egley for damages and declaratory relief. The case was delayed pending decision by the Supreme Court of *Fuentes v. Shevin*, 407 U.S. 67 (1972). After that decision and following oral argument, Adams' motion for partial summary judgment for the declaratory relief sought was granted.

Plaintiff-appellant Hampton purchased a 1967 Buick on September 3, 1969. The purchase was financed by means of a contract of sale which was assigned to The Bank of California (Bank), and which called for 30 monthly payments of $118.30,or a total of $3,549. After nearly two years of making payments, Hampton was allegedly late in making his August, 1971 payment. Hampton claims that the Bank agreed that he could

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[4]At the time of the summary seizure, the two vehicles contained various items of personal property not covered by the security agreement. Adams made unsuccessful attempts to recover this property by contacting both the Southern California Bank and Egley on two different occasions. He finally regained these items some six weeks later.

make up the missed payment at a later date, so long as he kept current on the rest of his payments, and in accordance with this agreement, Hampton tendered the next month's payment. This payment was returned to him, and sometime during the night of October 14, 1971, the Bank repossessed the car. In a letter dated October 4, the Bank noticed their intent to sell the vehicle unless Hampton paid the contract balance plus collection charges, a total of $946.89.

Hampton then commenced this lawsuit as a class action, challenging the constitutionality of summary prejudgment repossession without due process requirements of notice and opportunity for a hearing. The district judge enjoined the private sale pending a hearing on an order to show cause. Following settlement of the dispute between the Bank and Hampton, the trial judge for the Northern District of California on his own motion dismissed the case for lack of subject matter jurisdiction, finding that the state action required for jurisdiction in the federal courts under 28 U.S.C. § 1343(3) was lacking. An appeal was taken which has been consolidated with the appeal in the Adams case.

The issue on these appeals is whether prejudgment self-help repossession of secured property, as provided for in the security agreements between the creditors and the debtors and as authorized under sections 9503 and 9504 of the California Commercial Code involves sufficient state action to establish a federal cause of action.[5] Adams and Hampton invoke the jurisdiction

[5]It is important to emphasize that what is challenged here is not self-help repossession as a remedy, but rather the procedure of using self-help without giving notice or providing the opportunity for a hearing prior to the seizure.

of the federal courts pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3),[6] claiming that the summary repossession procedures constitute action taken "under color of state law" within the meaning of the Fourteenth Amendment.[7] If the repossession was not state action but only an individual invasion of individual rights, then the remedy is not the subject of the Fourteenth Amendment. *Civil Rights Cases,* 109 U.S. 3, 11 (1883). Adams also asserts federal question jurisdiction under 28 U.S.C. § 1331.

Both Adams and Hampton allege that California authorizes, regulates and participates in self-help repossessions by means of a pervasive statutory scheme which sets forth, *inter alia,* the basic right to repossess summarily; several terms which must appear in retail

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[6]42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343(3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

[7]Section 1 of the Fourteenth Amendment provides;

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

installment contracts; the procedures to be followed during and after repossessions; licensing requirements for a person in the business of repossessing; and provisions that clear title to the repossessed vehicle and permit the creditor to obtain a deficiency judgment.[8] Both allege that the Code provisions embrace a state policy encouraging self-help repossession, and conclude that by sanctioning self-help repossession in statutory form, California has "significantly" involved itself in the repossession process. Additionally, both debtors contend that Code § 9503 vests in the secured party a function normally performed by the State, and that § 9504 and California Civil Code § 2983.2, permitting the creditor to sue for a deficiency judgment, amount to judicial enforcement of procedures by which due process rights have been denied.

In addition to these arguments, appellee Adams submits that the express assertion by the S.Cal. Bank in the security agreement of its reliance on the remedies provided in the California Commercial Code clothe the creditor with the authority of state law. Adams also argues that the ultimate source of the right to repossess and resell collateral is the Code and not the security agreement.

We find that the State of California is not so significantly involved in the self-help repossession procedures undertaken by the creditors in these cases to

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[8]Relevant California statutory provisions are: (a) for the right to repossess, Civil Code § 2983.3; (b) for provisions required in retail motor vehicle conditional sales contracts, Civil Code § 2982; (c) for the right to sell the repossessed vehicle and the requirement of giving notice before resale, Civil Code § 2983.2; (d) for licensing of repossessors, Business and Professions Code §§ 7520, 7521; (e) for clearing title to the repossessed vehicle, Vehicle Code §§ 5600, 5601, 5602, and 9561.

permit this court to find the state action or conduct taken under color of state law required to establish a federal cause of action.

The under color of law requirement of § 1983 has been treated as the equivalent of the state action requirements of the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794-95 n.7 (1966); *Green v. Dumke*, No. 71-1260 (9th Cir., June 18, 1973) (slip opinion at 4); *but cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 188 *passim* (1970) (Brennan, J., concurring and dissenting). Under these concepts, the Supreme Court has frequently held that action taken by what would otherwise be considered to be private individuals or organizations is within the state action definition.[9] In the present cases we have action in the nature of summary seizure of personal property, taken by private creditors or their representatives, without having requested state help and without any direct action or review by state officials.[10] The Supreme Court has stated recently that:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must

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[9]*See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966); *Robinson v. Florida*, 378 U.S. 153 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *But cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); and *Evans v. Abney*, 396 U.S. 435 (1970).

[10]This factor is what distinguishes these cases from *Fuentes v. Shevin*, 407 U.S. 67 (1972), because there in enforcing the creditor's writ of replevin, issued summarily by a court clerk, a state officer seized the repossessed goods. Some of the evils are

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> have 'significantly involved itself . . .' to fall within the ambit of the constitutional prohibition." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (citation omitted).

Although it is not perfectly clear that the same state action test used by the Court in equal protection cases applies to due process cases, we must consider California's involvement in self-help repossessions undertaken by creditors located in California with the "significantly involved" concept in mind.

We begin our consideration of California's involvement in self-help repossession by referring to the admonition of the Supreme Court that:

> "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[the Supreme Court] has never attempted.' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (citation omitted).

One essential element for taking action under color of law is that the person act "with knowledge of and pursuant to" a State law, statute, etc. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970). The debtors point to the security agreement, the terms of which conform with Code §§ 9503 and 9504, and

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still present—no state official participates in the decision to repossess, nor does one evaluate the need for immediate seizure, nor does one review the basis for the claim to repossession—but because control over state power has not been abdicated, the State here does not act in the dark. *Cf. Fuentes, supra*, 407 U.S. at 93.

which refers to and incorporates the rights and remedies of a secured party under the Code, as evidence that the creditors acted with knowledge of and pursuant to a state statute. The debtors also note the reference in the security agreement to "any other applicable law," and the reliance by the creditors on their legal right to repossess as action taken with knowledge of and pursuant to state law. Finally, they contend that California, by the several statutory sections cited earlier, has legislated binding contract terms and conditions, and that the Commercial Code sections in particular have replaced the common law or contractual basis for these remedies. On the other hand, the creditors claim that it was the contract provision upon which the creditors relied for their authority to repossess.

Prior to the enactment of the California Commercial Code sections in issue, parties to a secured transaction could provide by contract for the remedy of self-help repossession;[11] indeed, this remedy has been recognized and permitted as a part of the common law.[12] However, we do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.*, that a secured party upon default had a right to take

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[11]California did not enact the Uniform Conditional Sales Act and the courts in this area were dependent upon case law and terms of the agreement. Upon the buyer's default, the seller could repossess under the terms of the contract, or if this right was not expressly given, it could have been implied. *See, e.g., Johnson v. Kaeser,* 196 Cal. 686, 694-95 (1925); *Miller v. Steen,* 34 Cal. 138, 144 (1867); *Hines, Rights and Remedies Under California Conditional Sales,* 23 Cal. L. Rev. 557 (1935).

[12]Gilmore, Security Interests in Personal Property § 44.1, at 1212 (1965); Uniform Conditional Sales Act § 16, comment; 2 F. Pollack & F. Maitland, History of English Law, at 574-77 (2d ed. 1899).

possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England[13] would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983. Moreover, the very fact that section 9503 gives the alternative of private repossession would appear to contradict the argument that all action under the statute must necessarily be "state" action.

The objective finding that the creditors in part acted with knowledge of and pursuant to state law is but one element of the action taken under color of state law requirement; alone it is not sufficient. The test is not state involvement, but rather is significant state involvement.[14] Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.[15] Further inquiry needs

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[13]"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." California Civil Code § 22.2 (West 1954).

[14]*Moose Lodge v. Irvis*, 407 U.S. 163, 173 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

[15]This extremely broad test appears to have been rejected even in the racial area in *Evans v. Abney*, 396 U.S. 435 (1970), where state law on will interpretation, although effectively excluding Negroes from what had been a public park, was found not to violate the Fourteenth Amendment. *See also Colvin v. Avco Financial Services, Inc.*, 12 U.C.C. Rptr. 25, 26-27 (D. Utah 1973); *Kirksey v. Thelig*, 351 F. Supp. 727, 732 (D. Colo. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972). If we were to accept the debtors' broad test, it would be very difficult to draw any line between state and private action. Indeed, the creditors point out this difficulty when they argue

to be made into the relationship between creditors and the State to see whether the State is significantly involved or entangled in the challenged repossessions, or whether mutual benefits are conferred which would lead to a finding of a "symbiotic relationship" between creditors and the State that was present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), but was absent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).[16]

The legal framework for self-help repossession is found in part 5 of article 9 of the Code. Generally, § 9503 provides that the secured party's right to possession of the collateral accrues on default, unless otherwise agreed, and it allows the secured party to take possession with or without the issuance of judicial process. The Code itself does not require any notice to the debtor prior to the taking of possession.[17] Section 9504 sets forth the right of the secured party to dispose of the collateral at a commercially reasonable public or private sale, and if the secured party fails to comply with statutory rules the debtor is authorized to pursue various remedies. In addition, provision is made for the debtor's right to surplus and liability for deficiency.

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that if any action in conformance with a state law were state action for purposes of the statute (§ 1983) or the constitutional amendment, then the action of the debtors in withholding payments without affording the creditors due process is state action. *See* Code § 2-717.

[16]Or as some courts have stated the formulation, the state must be directly or actively involved, rather than lend mere passive support. *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 654-56 (7th Cir. 1972); *Greene v. First National Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972).

[17]*Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*, 7 U.C.C. Rptr. 952 (Tex. Civ. App. 1970).

The debtors contend that the involvement of the state is reflected by the enactment of §§ 9503 and 9504 of the Commercial Code, which put into statutory form the right of creditors to repossess without judicial process, restrict the procedures to be used on default, and authorize a deficiency judgment.[18] They also state that the Rees-Levering Act[19] regulates all aspects of

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[18]Commercial Code § 9501(3) provides that certain rights and duties may not be waived or varied. In addition, the comment to § 9101 states:

"Except for procedure on default, freedom of contract prevails between the immediate parties to the secured transaction."

[19]The relevant portions of the Rees-Levering Act (California Civil Code §§ 2982 *et seq.*) are:

"§ 2982. Formalities of conditional sales contracts.

"(a) Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and, if printed, shall be printed in type no smaller than six point, and shall contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness. The conditional sale contract or a purchase order shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and an exact copy thereof shall be furnished the buyer by the seller at the time the buyer and the seller have signed the contract or purchase order. No motor vehicle shall be delivered under this chapter until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order and any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign, and which he has signed, during the contract negotiations. The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed. Every conditional sale contract shall contain, although not necessarily in the sequence or order set forth below, the following separate items:

* * *

"10. A notice, in at least eight-point bold type if the contract is printed, reading as follows: 'Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are en-

motor vehicle sales pursuant to retail installment contracts,[20] that repossessors are required to be licensed,[21] and that California clears the title to repossessed vehicles for the creditors. These state laws, they continue, set out a clear policy, authorizing and encouraging the use of self-help remedies which significantly involves California in the challenged activity.

The principal case upon which the debtors rely for legal support is *Reitman v. Mulkey*, 387 U.S. 369 (1967). The California legislature had, during the period 1959-1963, enacted several statutes regulating racial discrimination in housing. In 1964, pursuant to an initiative and referendum, art. I, § 26 (Proposition 14) was added to the state constitution to provide that the State could not place any limitation on the right of a person to deal with his own real property. The historical basis of the challenged constitutional provision led the California Supreme Court to hold that the intent of art I, § 26 was to authorize private racial discrim-

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titled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.'"

[20]If the broad test for state action proposed by the debtors were accepted, it would appear that any and every sales transaction that complied with the Rees-Levering Act would be state action. *Cf. Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972). It appears both illogical and strained to suppose that the framers of the Fourteenth Amendment would have included all private sales paid for in installments under the state action concept.

[21]The argument that the licensing of the repossessors could amount to significant state involvement in the repossession is probably foreclosed by *Moose Lodge*. See the dissent of justice Douglas, 407 U.S. at 180.

ination in the housing market, to repeal the Unruh and Rumford Acts (which regulated racial discrimination in housing), and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. The Supreme Court agreed that art I, § 26 significantly encouraged and involved the State in private discrimination. It held the California constitutional amendment to be violative of the United States Constitution. *Reitman, supra,* 387 U.S. at 381.

The present cases present at least two distinguishing features. First, the State in *Reitman* was involved to a far greater degree in the challenged conduct, because the proposition approved there had been initiated for the purpose of authorizing what had before been expressly prohibited, and if enacted would raise a barrier to the realization of a constitutional goal. This finding was made by the California Supreme Court, and on appeal the Supreme Court found no persuasive considerations upon which to overturn the judgment of the California court. In these self-help cases, the enactment of the provisions of the Uniform Commercial Code did not reverse the law as it had been prior to the enactment of the Code, but merely codified existing law for the most part. This is particularly true for the creditor's remedy of self-help repossession.

Second, and consistent with the reasoning of several other courts,[22] we are not convinced that the resolu-

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[22]*Colvin v. Avco Financial Services, Inc.,* 12 U.C.C. Rptr. 25 (D. Utah 1973); *Kirksey v. Thelig,* 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock National Bank,* 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First National Exchange Bank,* 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America,* 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick v. First National Bank,* 322 F. Supp. 604 (S.D. Fla. 1971); *Brown v. United States National Bank,* 12 U.C.C. Rptr. 549 (Ore. 1973); *Mes-*

tion of the state action question involving prejudgment self-help repossession of secured property is controlled by a case involving racial discrimination.[23] Unlike *Reitman*, there has been no finding that it was the intent of the State in passing § 9503 to authorize any conduct that would violate the Fourteenth Amendment. And unlike racial discrimination cases in general, which have evidenced a pattern of intentional indirect circumvention of constitutional rights,[24] these creditor remedies were based on economically reasoned grounds of very long standing, which appear to have been

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senger v. Sandy Motors, 121 N.J. Super 1, 295 A.2d 402 (1972); *contra, James v. Pinnix*, ... F. Supp. ..... (S.D. Miss. 1973); *Michel v. Rex Noreco, Inc.*, 12 U.C.C. Rptr. 543 (D. Vt. 1972).

[23]Although it may be argued that state action is a "jurisdictional" question to be considered separate from substantive matters, the test of balancing facts and weighing circumstances seems to require consideration of the substantive facts. This should not result in a hierarchy of rights, or different state action tests for due process and equal protection, but rather should permit independent factual determinations of state action on a case-by-case approach.

[24]*See Grafton v. Brooklyn Law School*, No. 73-1098 (2d Cir., May 24, 1973), where Chief Judge Friendly also suggested that (a) the fact that the challenged regulations required only what the law schools had been doing for years and, acting through their own professional organizations, had decided they should do, distinguished the challenged written examination requirements from state action found when disciplinary actions were taken under "symbolic" regulations for maintenance of public order in *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970), and (b) while an

> "index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to confront other constitutional rights." Slip opinion at 3757.

Thus, merely enacting into statutory form what had been the accepted practice for years, and a limited involvement that may be sufficient for racial cases, does not command a finding of "state action" in an economic due process case.

the topic of extensive research and legislative investigation.[25]

We consider *Reitman* quite relevant for what the Supreme Court stated that case did not hold:

> "[the California court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations." 387 U.S. at 376.

In addition to the practical consideration that a great deal of human behavior conforms to state law, we find the last portion of the quoted language nearly controlling as authority on which to reject the debtors' allegations that by merely putting into statutory form existing private remedies, the State conclusively and significantly involves itself in the private conduct.

Nor do we find anything approaching the symbiotic relationship between the lessor and lessee that was present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 174-75. The creditors in these cases were not located on land owned by any public

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[25]*See Fuentes v. Shevin*, 407 U.S. 67, 103 (White, J., dissenting); *R. Johnson, Denial of Self-Help Repossession: An Economic Analysis*, found in the Appendix to the Amicus Brief of the Permanent Editorial Board for the U.C.C., and filed separately with the Amici Briefs of Ford Motor Credit Co., General Motors Acceptance Corp., Chrysler Credit Corp., and C.I.T. Financial Services, Inc.

authority, and were not part of a large, continuing public enterprise.[26] It has not been shown how the State or any of its agencies has been benefited as was the parking authority in *Burton*, nor has it been shown how any significant benefit has been conferred on the creditors by the enactment of § 9503.[27] It is arguable that the State has made it more difficult for a debtor to opt out of the self-help remedy now that it has been put in statutory form,[28] but the creditors had the remedy prior to the legislation, and repeal of § 9503 would still leave the parties free to provide in the security agreement for the self-help remedy. The State cannot be held responsible for creating the conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property.[29]

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[26]*Cf. Male v. Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972) (Urban Renewal Agency presented privately owned apartment complex with a fully prepared building site; held, symbiotic relationship).

[27]*Cf. Doe v. Bellin Memorial Hospital*, No. 73-1396 (7th Cir., June 1, 1973) (no state action, because government did not regulate the particular activity challenged, the State was not the beneficiary of the hospital's rules, and the hospital obtained no benefits from the State as a result of following the challenged procedures on abortion).

[28]*See Kirksey v. Thelig*, 351 F. Supp. 727, 731 n.8 (D. Colo. 1972); *Neth, Repossession of Consumer Goods; Due Process for the Consumer: What's Due for the Creditor*, 24 Case W. Res. L. Rev. 7, 56 (1972).

[29]Summary repossession without notice or an opportunity for a hearing may in some instances be unconscionable, or void as a matter of public policy. *See Ford Motor Credit Co. v. Waters*, 12 U.C.C. Rptr. 18 (Fla. Dist. Ct. App. 1973); *Fontaine v. Industrial National Bank*, 298 A.2d 521 (R.T. 1973) [11 U.C.C. Rptr. 1096]. Both cases held wrongful, summary repossession where the creditor had previously accepted late payments after default. *Cf. D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187-88 (1972).

Another basis upon which the debtors urge that state action may be found is the extensive system of state regulations. In *Robinson v. Florida,* 378 U.S. 153 (1964), state health regulations required separate toilet facilities for whites and blacks. There was nothing that directly forbade restaurants from serving both races. The Supreme Court found that the regulations placed burdens upon restaurants serving both races and concluded:

> "[T]hat the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment." 378 U.S. at 156-57.

In *Moose Lodge, supra,* the trial court directed attention to the many ways in which the Pennsylvania Liquor Control Board exerted its regulatory will over private clubs as proof of the pervasive nature of state action there. 407 U.S. at 176-77. But the Court pointed out that none of the regulations had significance on the issue for decision, that is, the establishing or enforcing of discriminatory guest policies. Here, appellees point to a comprehensive system for sale of collateral, notice of sale, and application of payments. None of these requirements addresses itself to the issue of when and whether private repossession will be used or whether formal court action will be preferred. There is no "pervasive" state action directed to self-help repossession to require its use. It is simply named as one of two already existing alternatives.

A similar issue has been involved in non-racial cases involving utility service termination procedures of pri-

vately owned utility companies. *Palmer v. Columbia Gas, Inc.*, No. 72-1772 (6th Cir., May 22, 1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); *Bronson v. Consolidated Edison*, 350 F. Supp. 443 (S.D.N.Y. 1972); *Hattel v. Public Service Co.*, 350 F. Supp. 240 (D. Colo. 1972); *Stanford v. Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972). *Contra, Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972); *Jackson v. Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D. Pa. 1972). In *Palmer*, an Ohio statute authorized the utility to enter the premises of a customer who allegedly had not paid his bill, to disconnect service and remove equipment. Stressing the monopolistic character of the company, and the necessity of the service it provided, the Sixth Circuit found state action because virtually every aspect of the company's operations were subject to regulation by the state or city, because the state had granted to utilities powers not usually possessed by private corporations (authorized entry to private property; eminent domain), and because the company was undertaking a legitimate public function by providing gas service.

The *Lucas* case involved a similar fact situation, but there the Seventh Circuit found that the authority given to the utility by the State to enter private property had not been invoked by the defendants. The activity challenged by the plaintiffs in *Lucas* was termination of service, and the utility could accomplish this by simply throwing the proper switch, or disconnecting wires; thus, the Court found no action taken under color of state law by the utility.

For our cases, the utility termination cases are relevant because they deal with state action in a non-racial

area. We agree with the standard that the support by the State of private conduct must be significant to come within § 1983, and that, as stated by the Seventh Circuit:

> "affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy . . . ." *Lucas, supra,* 466 F.2d at 656.

And, we can distinguish the creditor's actions in our cases from the utility in *Palmer* on the basis of the greater extent to which the State has reserved power to control and regulate the operations of a public utility, and the greater amount of power given to the utility which is usually reserved to the State. *See Palmer, supra,* slip opinion at 15.[30]

The debtors contend that, although private in form, the substance of the action of the creditors was to perform a function or service that would otherwise in all likelihood be performed by the State, and thus is distinguishable from the facts in *Moose Lodge.* The debtors rely on the "public function" cases decided by the Supreme Court,[31] and particularly on the approach tak-

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[30]Other cases that have stressed the continuous nature of the public enterprise or the continuity of regulation are: *Male v. Crossroads Associates,* 469 F.2d 616 (2d Cir. 1972); *Smith v. Holiday Inns, Inc.,* 336 F.2d 630 (6th Cir. 1964); *McClellan v. University Heights, Inc.,* 338 F. Supp. 374 (D.R.I. 1972); *McQueen v. Druker,* 317 F. Supp. 1122 (D. Mass. 1970), *affirmed in part,* 438 F.2d 781 (1st Cir. 1971); *cf. Weigand v. Afton View Apartments,* 473 F.2d 545 (8th Cir. 1973).

[31]The "public function" cases relied on by the debtors have held that activity undertaken by apparently private individuals or organizations may be characterized as the performance of a state or public function. Among others, they cite *Smith v. Allwright,* 321 U.S. 649 (1944) (state law extensively regulated Texas primaries, held that the Democratic Party was an agent of

en by the Fifth Circuit in *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).[32] There, the Fifth Circuit dis-

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the State because the selection of party nominees was delegated to a private political party, thus exclusion of Negroes from voting in primaries was a Fourteenth Amendment violation); and *Terry v. Adams*, 345 U.S. 461 (1953) (Texas county political group excluded Negroes from preprimary elections, which were not regulated by the State; however, because the winners of these elections nearly always ran unopposed in later elections, state action was found, either because the state permitted the only effective election or because the private group performed a state function). Among other distinguishing features, both of these cases may be limited to racial discrimination in voting, a practice specifically prohibited by the Fifteenth Amendment.

Another case cited by the debtors is *Evans v. Newton*, 382 U.S. 296 (1966). Public officials, pursuant to privately created trust, had managed a park; private trustees were appointed, but the Court held that the park remained a public facility, and that the private trustees were performing the same public function of park management—the park was still entangled with the state. Under the terms of the will, however, the Georgia state court subsequently applied the cy pres doctrine and held that the property reverted to the testator's heirs because to permit Negroes to use the park would frustrate the intent of the testator. The Supreme Court found no discriminatory state action in giving effect to state law. *Evans v. Abney*, 396 U.S. 435 (1970).

In *Abney*, the courts were not called upon to enforce racial discrimination, but instead were called upon to recognize the privately created rights in the deed of trust, even though it contained a racial restriction apparently authorized by a state statute (which arguably had changed the common law). The *Abney* distinction between court enforcement of privately created rights and giving legal effect to those rights can be analogized to the facts here, where the creditor is not asking the court to enforce his right to possession, but rather is defending on the basis that the courts should recognize the legal effect of the provision for self-help repossession in the Code and in the security agreement. *See* Neth, *supra*, n.28 at 60; *Messenger v. Sandy Motors*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

[32]Using a similar approach are *Magro v. Lentini Brothers Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971); and *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (Judge Levin also speaks to the issue of jurisdiction under § 1331.) *See also B. Clark & J. Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355, 377 (1973)

Subsequent history of *Hall* appears at 468 F.2d 845 (5th Cir. 1972).

cussed state action in the context of whether appellant, a tenant who had her television set seized by a landlord under the authority of a Texas statute (which gave the landlord a lien on personal goods of the tenant, and authority to enforce that lien by peremptory seizure of the property), had stated a claim for which relief could be granted under 42 U.S.C. § 1983. That circuit held:

> "In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer of the state or an official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State." 430 F.2d at 439.

Hall is distinguishable because the state of Texas was significantly involved in the private landlord's conduct. The property seized in that case belonged to the tenant, and the action of the landlord was taken pursuant to a Texas statute which vested authority in the landlord that was normally exercised by the State and had historically been a function of the State of Texas. The landlord clearly had invoked state procedures in order to seize the tenant's property. *Cf. Joy v. Daniels*, No. 72-2479 (4th Cir., June 11, 1973). In these self-help cases, the creditor was seizing property that had been entirely his and that, practically and according to the terms of the contract, the debtor had not yet paid for. Further, a strong case can be made that it is a tradition that repossession is not a state function, and that the creditor was invoking a private remedy rather than a state power which had been delegated to him.

Legal researchers point out that English law in the thirteenth century rigorously prohibited self-help, that it "at a fairly early stage . . . begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment."[33] Historians appear to differ over just when the law began to ease with respect to allowing self-help.[34] Based on this history, it does not appear likely that the Fourteenth Amendment, when written, was intended to eliminate summary self-help in light of the prevailing use of peaceful repossession.[35]

The debtors attack § 9504 on the grounds that the procedures set forth in that section supplement the self-help right and so should be considered as part of the challenged conduct, and that the deficiency judgment action authorized by § 9504 represents a statutorily created right not allowed creditors at common law, and results in judicial enforcement of procedures whereby due process has been denied, thus coming under *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953).

The creditors respond that § 9504 was not held unconstitutional by the district court's opinion, and therefore is not in issue on this appeal. Although the opinion of the lower court does explicitly state that § 9504 procedures are unconstitutional, the creditors contend that the opinion specifically limited the issue

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[33]2 F. Pollock & F. Maitland, *The History of English Law* 574 (2d ed. 1899).

[34]*See* Pollock, n.33, *supra*.

[35]*Accord, Pease v. Havelock National Bank*, 351 F. Supp. 118, 122 (D.Neb. 1972). It may also be argued that no debtor would reasonably think that in repossessing the unpaid-for vehicle, the creditor was acting as an arm of the state. *Cf. Grafton v. Brooklyn Law School*, No. 73-1098 (2d Cir., May 24, 1973) (Slip opinion at 3760).

there to repossession procedure, and did not discuss any constitutional defect of the Code provision for permitting a deficiency judgment action to secured parties.

One major difference between enforcement of a deficiency claim and enforcement of racially restrictive covenants is that the deficiency claim is based on the underlying debt, and thus arguably not related to the alleged unconstitutional seizure. Another is that the restrictive covenant cases may be and apparently have been limited to situations where the judicial enforcement had the effect of forcing an unwilling party to discriminate. Furthermore, *Shelley* involved what would effectively amount to a zoning practice, traditionally a state activity.

Finally, we note cases which have held that state enforcement procedures, applied neutrally, will not alone rise to the level of state action absent a showing that a state in applying its law is privy to a private party's discriminatory purpose, *see Griffin v. Maryland*, 378 U.S. 130 (1964) (state arrest and prosecution of blacks for using a privately owned amusement park open to the public); *Weigand v. Afton View Apartments*, 473 F.2d 545, 548 (8th Cir. 1973); *Lavoie v. Bigwood*, 457 F.2d 7, 11 (1st Cir. 1972), or that some significant state power has been delegated to the private organization or individual. *Joy v. Daniels*, No. 72-2479 (4th Cir., June 11, 1973) (mortgage benefits and rent supplements received from FHA, authorization from the County Council, and state approval of federal participation when combined with use of state eviction procedures led to a finding of state action); *Lavoie v. Bigwood, supra* (confluence of court-ordered eviction and monopoly power created by zoning led to

finding state action in eviction of mobile home park tenant).

Adams contends that the Code provisions clothe secured parties with the authority of state law, relying on *United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966); and *Williams v. United States*, 341 U.S. 97 (1951). The first two cases involve action taken directly and clearly in concert with state officials in an indirect attempt to avoid discrimination prohibitions. The *Williams* case was concerned with a private detective who held a special police officer's card issued by the city of Miami, Florida, had taken an oath and qualified as a special police officer, and was employed by a business corporation to uncover the identities of thieves who had been stealing their property. Using brutal methods, the detective, often accompanied by a police officer and flashing a badge, obtained confessions from several suspects. That fact situation amply describes what is meant by being clothed with the authority of state law. The creditors in the present cases have not been endowed with anything comparable to the authority given the detective in *Williams*, nor were they working in active concert with state officials as were the defendants in *Price* and in *Guest*.

A final word about *Fuentes v. Shevin*, 407 U.S. 67 (1972), which seems to constitute both warp and woof of appellee's contentions. On the face of it the Court was there dealing with a state statute under which an action had been filed in court, a writ formally issued, and service of the writ by a state agent. No question about state action. We do not read *Fuentes* so broadly that it encompasses all private actions be-

tween individuals pursuant to their consensual undertakings. The plurality, speaking for the Court, recognize that at common law in addition to formal state action, a creditor could proceed by self-help. 407 U.S. 67, 79 n.12. The minority appears to read the Court's opinion as one clearly distinguishing between the state action rule of *Fuentes* and private repossession.

> "It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all." 407 U.S. at 102.

We reverse in *Adams* and affirm in *Hampton,* noting that the proper ground for dismissing in *Hampton* was failure to state a federal cause of action, rather than that the federal court lacked subject-matter jurisdiction. *Bell v. Hood,* 327 U.S. 678, 681-83 (1946). BYRNE (dissenting)

Both Adams and Hampton sought relief under 42 U.S.C. § 1983 on the grounds that the creditor banks acted "under color of law" and deprived them of "due process of law" by repossessing their automobiles pursuant to Cal. Comm. C. § 9503 and selling those vehicles pursuant to Cal. Comm. C. § 9504. The majority opinion holds in favor of the creditor banks on the "under color of law" issue and apparently considered it unnecessary to discuss the "due process of law" issue. It is my view that the debtors should prevail on both issues.

Regarding the "due process of law" issue, even the creditors appear to concede that, if they did act "under color of law," the debtors were deprived of due process

of law because no judicial hearing was conducted prior to the summary self-help procedures utilized.

Undoubtedly, the creditors' apparent concession on the "due process of law" issue is compelled by the recent case of *Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972) where the Supreme Court stated:

> "The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard ony the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' *Boddie v. Connecticut*, 401 U.S., at 379, including statutory entitlements. See *Bell v. Burson*, 402 U.S., at 539; *Goldberg v. Kelly*, 397 U.S., at 262.
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> "The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See *Sniadach v. Family Finance Corp.*, 395 U.S., at 342 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.

> "Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.' To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possesson and use of the goods."

By its nature, the "under color of law" issue is very conceptual and readily susceptible to purposeful interpretation by both the creditors and the debtors. Admittedly, Judge Trask, writing for the majority, supports his holding on this issue with adequate logic and case authority. He mentions each of the debtors' five arguments in opposition to his holding and he distinguishes the case authority which they offer in support of those arguments. However, in doing so, he seems to *purposefully characterize* §§ 9503 and 9504 as being mere codifications of previously-existing commercial law. Indeed, such a purposeful reasoning process could

likewise justify a contrary holding and thereby protect debtors such as Adams and Hampton from the well-known creditor abuses which often occur when those summary self-help provisions are utilized.

Such a contrary holding can be justified by the debtors' "state encouragement argument" and supported by *Reitman v. Mulkey*, 387 U.S. 369 (1967). Both that argument and that case are discussed in the majority opinion. The majority claims that *Reitman* is distinguishable from the instant two cases for the following two reasons: (1) In *Reitman*, the State of California was involved to "a far greater degree" because it approved Proposition 14 and thereby reversed previously-existing law. In the instant two cases, the legislature enacted §§ 9503 and 9504 in order to codify previously existing law rather than to reverse it; and (2) In *Reitman*, California's "subjective intent" in approving Proposition 14 was to indirectly circumvent individual constitutional rights and to encourage racial discrimination in housing. In the instant two cases, the debtors have failed to show that the State harbored such an insidious "subjective intent."

The majority's asserted distinctions do not render *Reitman* inapplicable to the instant two cases. The first alleged distinction is merely a bare conclusion, i.e., that the State was involved to "a far greater degree" in *Reitman*, is justified by an insignificant factual difference, i.e., §§ 9503 and 9504 merely codified previously-existing law rather than reversing it. The second asserted distinction seems to suggest that the debtors must prove an *un*provable fact, i.e., that California's subjective intent in enacting §§ 9503 and 9504 was to deprive debtors such as Adams and Hampton of due process of law. Such an argument tends to obscure *the*

important fact that the creditor banks relied on those statutory provisions in order to deprive the debtors of their proprietary interests in the automobiles without due process of law.

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The State of California deliberately chose to follow a State policy of encouraging the repossession and sale of collateral without a prior judicial hearing. It embodied such a policy in §§ 9503 and 9504. The creditors admit that they acted pursuant to those sections when they repossessed and sold the collateral. The State meaningfully encouraged the repossessions and sales and thus became significantly involved within the meaning of *Reitman v. Mulkey*, 387 U.S. 369 (1967).

It is clear that the creditors acted under color of State law and it follows that they deprived the debtors of "due process of law" by repossessing their automobiles pursuant to that law.

I would affirm in *Adams* and reverse in *Hampton*.

APPENDIX B.

Order on Suggestion of En Banc Consideration.

United States Court of Appeals for the Ninth Circuit.

George T. Adams, Plaintiff-Appellee, vs. Southern California First National Bank, Defendant-Appellant. No. 72-1484.

Willie O. Hampton & Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, vs. The Bank of California, National Association, a California banking corporation, Defendant-Appellee. No. 72-1888.

[March 12, 1974].

Before: CHAMBERS and TRASK, Circuit Judges, and BYRNE,* District Judge.

A petition for rehearing was denied by a majority of the panel, Judge Byrne dissenting.

Upon request of a member of the Court who was not a member of the panel, proceedings were commenced to obtain a vote of the Court to consider the cases en banc.

The following changes have been made in the opinion: (all references are to the slip opinion)

Seventh line from bottom of the middle paragraph on page 19: Strike "these self-help cases"; substitute "Hampton".

Add footnote 33a at the end of the same sentence as above, as follows:

> "In *Adams* this argument regarding the creditor's ownership of the property cannot be made. As

*Honorable William M. Byrne, Sr., United States District Judge for the Central District of California, sitting by designation.

> stated, *supra,* Adams borrowed money and secured the loan by a note and surety agreement giving the secured party the right to take possession. In *Hampton* the purchase was financed by a purchase contract payable in installments. *Hall,* on its facts, does not present such a distinction. The issue in *Hall* was the legality of a seizure resting solely upon a landlord's lien statute. While the statute in *Hall* provided that nothing therein 'shall prejudice' any contractual agreements between lessor and lessee concerning the subject matter of the statute (430 F.2d at 432 n.1), there was no indication in the case that any such agreement had been made."

All members of the Court in active service have considered a request for en banc consideration. A majority of the Court has rejected the request.

Judge Hufstedler files an opinion dissenting from the rejection of en banc consideration.

Judge Ely did not participate in the consideration or decision of the en banc request. Judge Wallace did not participate in the consideration or decision of the en banc request as to the *Adams* case.

HUFSTEDLER, Circuit Judge, dissenting from denial of hearing en banc:

I cannot agree that California's self-help repossession scheme does not so significantly involve the state as to constitute state action for the purpose of invoking the Fourteenth Amendment. Although each aspect of California's participation, considered alone, might be inadequate to compel a state action conclusion, the combination of its activities draws the state well within

the state action ambit. As *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451 teaches, ostensibly private action is state action if the state both heavily regulates the private activity and specifically approves the very practice challenged under the Fourteenth Amendment.[1] Underlying the principle in *Pollack* is a recognition that enterprises operating within heavily regulated areas of activity are performing functions sub-

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[1]"We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service [on Capital Transit vehicles] to make it necessary for us to consider [whether the radio service violates the First and Fifth] Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. *We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.*" Public Utilities Commission v. Pollak (1952) 343 U.S. 451, 462 (emphasis added; footnote omitted). *Compare* Reitman v. Mulkey (1967) 387 U.S. 369, 379, *with* McCabe v. Atchison, T. & S.F. Ry. (1914) 235 U.S. 151; Linscott v. Millers Falls Co. (1st Cir. 1971) 440 F.2d 14, 16, *with* Railway Employees' Dept. v. Hanson (1956) 351 U.S. 225, 231-32.

The Supreme Court has consistently regarded the statement in *Pollak* as having the force of a holding. (*See, e.g.*, Evans v. Newton (1966) 382 U.S. 296, 301; *cf.* Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163, 175-76 n.3.) Similarly, although *Pollak* addressed the issue of "federal government action," the Court has indicated that *Pollak's* principle is no less applicable in the state action context. (*See* Evans v. Newton, *supra.*) Finally, it is of note that *Pollak* was not a racial discrimination case. (*See* Evans v. Newton, *supra* at 319-20 (Harlan, J., dissenting).) Hence Judge Trask's suggestion, even if otherwise sound, that certain state action principles should be confined to racial discrimination controversies cannot be applied to the rule articulated in *Pollak*.

stantially affecting the public weal. The more pervasive is the regulation, the more likely is the regulated enterprise performing a function of the state.[2] Demonstration of governmental interest, rather than the particular nature[3] or history[4] of the specific activity, is the public function indicium. When the activity not only falls within a regulated area, but also is the subject of a statute or administrative rule that expressly authorizes or mandates that activity by a regulated enterprise, private conduct pursuant to the statute or rule is deemed to be state action, as *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163 implicitly acknowledges. There, the state heavily regulated some aspects of the lodge's activity, but it exercised no regulatory jurisdiction over the lodge's discriminatory membership and guest policies.[5] The Court distinguished *Moose Lodge* from *Pollack* solely on the ground that "[u]nlike the situation in *Public Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." (*Moose Lodge No. 107 v. Irvis*, supra at 165-76 n.3.) If the Pennsylvania regulatory agency had authorized the discriminatory policies of the lodge, the state would thereby have assumed regulatory jurisdiction. Having

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[2]*Cf.* Evans v. Newton (1966) 382 U.S. 296, 301-02.

[3]*Cf.* Terry v. Adams (1953) 345 U.S. 461; Marsh v. Alabama (1946) 326 U.S. 501.

[4]*Cf. Evans v. Newton* (1966) 382 U.S. 296.

[5]One of the state's regulations indirectly exerted influence on the lodge's policies. The Court obliterated this indirect effect of the regulation when it held that the regulation, facially neutral, was unconstitutional insofar as it could be applied to enforce the lodge's racially discriminatory policies.

assumed regulatory jurisdiction of such behavior, any acts of the lodge authorized by statute or regulation would have been state action.

When the principles of *Pollack* and *Moose Lodge* are applied to the California self-help repossession scheme, the conclusion of state action is compelled. The automobile-secured credit industry is heavily regulated by the state. (*See, e.g.*, Cal. Civil Code §§ 2981-84.4; Cal. Comm. Code §§ 9101-507.) Self-help repossession, an ingredient of the industry, is the subject of elaborate state regulations. California authorizes self-help repossession (Cal. Comm. Code § 9503), and authorizes the creditor to obtain a deficiency judgment after sale of the repossessed automobile (*id.* § 9504). It requires that the police be notified of self-help repossessions (Cal. Veh. Code § 28) and facilitates the transfer of title to repossessed automobiles (*id.* §§ 5601, 9561). The Private Investigators and Adjusters Act (Cal. Bus. & Prof. Code §§ 7500-90) licenses repossessors and regulates their activities. A state agency conducts examinations, collects fees, disciplines licensees, and otherwise administers the regulations. (*Id.* §§ 7510-14; *see* 16 Cal. Admin. Code §§ 651-90.) The final weld of "private" action to state action is made by the statutes authorizing state licensed and regulated repossessors to carry out self-help repossession (Cal. Bus. & Prof. Code §§ 7500-90) on behalf of creditors who are given the right to use self-help unless the contract between the creditor and the debtor expressly denies them the remedy. (Cal. Comm. Code § 9503.)

California is not a neutral bystander in a contest between these private debtors and creditors. The economy of the state has become heavily dependent on the

automobile industry in all its parts, an essential feature of which is consumer credit secured by interest in automobiles. California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduces the creditors' costs of repossession, for the evident purpose of stimulating the flow of consumer credit for the benefit of the state's economy, at the expense of those whose automobiles are summarily seized. Thus, the automobile-secured credit industry in California has become a state instrumentality through which California seeks to generate public benefits. Of greater moment in this state action context, however, is that California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasi-judicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees. (*See Hall v. Garson* (5th Cir. 1970) 430 F.2d 430; *cf. Evans v. Newton* (1966) 382 U.S. 296; *United States v. Wiseman* (2d Cir. 1971) 445 F.2d 792. *See also Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715; *Terry v. Adams* (1953) 345 U.S. 461; *Williams v. United States* (1951) 341 U.S. 97.)

California's involvement in self-help repossession can be put into striking perspective by comparing these cases to *Moose Lodge*. *Moose Lodge* would have been analogous to *Adams* and *Hampton* if in *Moose Lodge* the state had not merely generally regulated the lodge, but had also, for public purposes, specifically author-

ized the lodge to discriminate on the basis of race and licensed agents of the lodge to effect that discrimination. As *Moose Lodge* itself indicates, a scheme of that kind would have brought the state squarely within the range of *Pollak*. (*Compare Moose Lodge No. 107 v. Irvis, supra* at 178-79, *with id.* at 175-76 n.3.)

Underlying the reluctance of this court to reach the state action destination to which the Supreme Court has directed us is fear that the same path will carry the Fourteenth Amendment into boundless territory. I do not share that fear. Very substantial limitations of the state action doctrine articulated by the Supreme Court in *Public Utilities Commission v. Pollak, supra,* inhere in that decision. (*See Moose Lodge No. 107 v. Irvis, supra.*) Even in those restricted instances in which private activity is drawn into the public orbit, few private acts are of the kind that could be found substantively violative of the Fourteenth Amendment. When the alleged violation of the Fourteenth Amendment lies in the procedural due process realm, flexible accommodations of the competing interests involved can be fashioned. (*See, e.g., Fuentes v. Shevin* (1972) 407 U.S. 67, 90-92; *cf. Lindsey v. Normet* (1972) 405 U.S. 65; *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174.)

We cannot permit the Fourteenth Amendment to be blunted because we fear that it may sometimes have too sharp a point. The judiciary has ample tools to halt excesses if they arise.

I would take the cases en banc, affirm *Adams,* and reverse *Hampton.*

APPENDIX C.

Memorandum Decision and Order Granting Partial Summary Judgment.

United States District Court, Southern District of California.

George T. Adams, Plaintiff, v. Richard Egley, dba et al., Defendants. Civil No. 70-345-N.

Pedro Posadas, Plaintiff, v. Star and Crescent Federal Credit Union, et al., Defendants. Civil No. 70-359-N.

Filed: Feb. 11, 1972.

The two cases presently before this court on plaintiffs' motion for partial summary judgment involve the constitutionality of California Commercial Code Sections 9503 and 9504, which provide for the repossession and disposition of collateral by a secured party after default by the debtor.[1] These lawsuits, consolidated for consideration on the basis of their similarity, represent the latest development in the continuing attack on statutory prejudgment remedies which began with the 1969 Supreme Court decision in Sniadach v. Family Finance Corporation, 395 U.S. 337. In that case a Wisconsin wage-garnishment procedure was held to constitute a taking of property without prior notice and hearing, and thus to violate procedural due process as guaranteed by the Fourteenth Amendment. The California provisions here at issue, authorizing repossession and sale without judicial process, are challenged on a like basis.

The facts of the instant cases are as follows:

1. *Adams v. Egley, et al.;* 70-345-N

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[1]The text of these provisions are set forth as an Appendix to this Memorandum.

On June 17, 1968, plaintiff Adams borrowed one thousand dollars from the Bank of La Jolla, executing a promissory note and a security agreement in favor of the bank. The terms of the security agreement provided that should the debtor fail to make payment of any part of the principal or interest as provided in the promissory note:

> ". . . the Secured Party shall also have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or other applicable law, and all rights and remedies shall, to the extent permitted by law, be cumulative. Without limiting the generality of the foregoing, upon the occurrence of any such event of default the Secured Party is entitled to take possession of the vehicle and to take such other measures as Secured Party may deem necessary for the protection of the vehicle." (Security Agreement, page 2.)

At a time after execution of the note defendant Southern California First National Bank became the successor in interest to the Bank of La Jolla.

Plaintiff fell behind on his payments and defendant Egley, acting for the bank, took possession of two of the three vehicles which served as security under the agreement. They were then sold by the bank at private sale.

2. *Posadas v. Star and Crescent Federal Credit Union, et al.;* 70-359-N

On June 29, 1967, plaintiff Posadas borrowed approximately $1,300.00 from defendant Star and Crescent Federal Credit Union to buy a truck, executing a

promissory note and security agreement in favor of that defendant, pledging the truck as security.

In February, 1968, plaintiff borrowed an additional $3,339.00 from the credit union to buy an automobile, executing a separate note and security agreement, pledging the automobile as security. Both security agreements contained provisions that "in the event of default of any term or condition of this security agreement, or the promissory note aforesaid, Secured Party shall be entitled to immediate possession of said . . . property according to law. . . ."

In June, 1970, plaintiff Posadas fell behind on his payment schedules for both loans. On September 25, 1970, defendant Tipton, acting for defendant credit union, repossessed the plaintiff's truck. On December 18, 1970, plaintiff surrendered his 1968 automobile to the creditor in exchange for the return of the truck.

Before considering the constitutional aspects of the present controversy, this court must direct its attention to the question of its jurisdiction to decide the matter. Plaintiffs have asserted two bases for the founding of jurisdiction in this court: first, federal question jurisdiction under 28 U.S.C. § 1331; and second, jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The request for a statutory three-judge court pursuant to 28 U.S.C. § 2281 *et seq.* is inapposite in this case, since no action of either a state or local officer is sought to be restrained, and thus the specific requirements of that statute are not met. See Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

The federal question purportedly raised here is whether the summary repossession of plaintiffs' prop-

erty constitutes a taking without due process of law. The constitutional provision under which this action is alleged to arise and with which this court concerns itself is the due process clause of the Fourteenth Amendment, which provides that no state shall take any action which shall deprive the individual of property without due process of law. The Civil Rights sections also asserted by plaintiffs provide for a judicial remedy where one is deprived of any constitutional or statutory right by any person acting "under color of state law." It is fundamental, therefore, that for jurisdiction to lie on either ground, some significant state involvement in the alleged wrongful acts must be shown; the conduct of private individuals, however wrongful or discriminatory, does not come within the purview of those sections if the state has in no way authorized, sanctioned, or encouraged it.[2]

Southern California First National Bank, defendant in the *Adams* case, No. 71-345-N, has challenged this court's jurisdiction on the basis that under the facts of these cases no state action or action under color of state law can be shown. What is involved here, they state, are private contracts whose terms are self-executing. Unlike cases involving garnishment, replevin, claim and delivery, attachment, or distraint procedures, we deal here with repossession which is a self-help remedy: the creditor, either by himself or by means of a private collection agency, may enter the premises of a debtor, remove the designated collateral, and dispose of it, all without the aid of any state official. Nor are these

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[2]There has been substantial discussion on the differences in scope between state action necessary under § 1331 and the action under color of state law proscribed by § 1983 (see detailed discussion in Klim v. Jones, *supra*). However, that distinction need not concern us in this case.

acts of repossession solely dependent on statuory authorization as, for example, liens under Innkeeper Lien laws. Rather, repossession is specifically provided for in a signed security agreement between the parties. Thus, argue the defendants, the taking is pursuant to private agreement with no state involvement on which to found jurisdiction.

This court cannot agree, and finds the situation governed by the reasoning of the Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967). That case affirmed the constitutional infirmity of a clause in the California Constitution which prohibited restrictions on an individual's right to sell property to whomever he chooses. The Supreme Court found that this provision, enacted as a repealer of California's various anti-discriminatory housing legislation, actually served as state encouragement of private discriminations. Hence, despite the fact that all parties to the controversy in *Reitman* were private individuals not connected with the state and that no state personnel were concerned, the Court found in the mere enactment of the statute state involvement sufficient to bring the alleged discriminatory acts within the purview of the Fourteenth Amendment.

The cases here under consideration present an analogous situation. The repossessions complained of as violations of due process were ostensibly private acts pursuant to a contract. However, it cannot be seriously questioned that the presence of Sections 9503 and 9504 had a significant impact on the contents of that contract's provisions. The specific reference to the Uniform Commercial Code in the Adams contract and to "immediate possession . . . according to law" in the

Posadas contract are ample indication that in drawing up the agreements defendant creditors were "persuaded or induced to include" repossession by the fact that such repossession was permitted by statute. *Cf.* Evans v. Abney, 396 U.S. 435, 445 (1970). These Commercial Code sections set forth a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy. It is therefore apparent that the acts of repossession were made "under color of state law" as required by the Civil Rights statutes, and that the passage of Sections 9503 and 9504, which authorize such acts, are sufficient state action to raise a federal question.

This precise issue was raised in the recent case of Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). There in its consideration of the constitutionality of distraint procedures under the Pennsylvania Landlord and Tenant Act, a three-judge court found that a written lease provision permitting levies and sales did not create an independent right in the landlord to distrain. Rather, the court said:

> ". . . the tenant agrees only that the landlord has the right to act pursuant to 68 Pa. Stat. Ann. § 250.301 et seq. If this provision means anything, it means only that the tenant agrees that, in cases wherein he has defaulted, he will not object on legal grounds to the use of the statutory distress procedure." 319 F. Supp. 284, 294.

While such an approach might also be applied to the instant situation, it does not appear necessary to go this far. Even if an independent right to repossess

is created by the signed security agreement, that right is created under authority of state law, and consequently does not defeat the jurisdiction of this court.

Having settled the question of jurisdiction, I now turn to the major question presented by these cases. The issue is a simple one: whether the repossessions which occurred in the situations presently under consideration represent takings without due process of law, thus denying plaintiffs their constitutional rights. This court feels compelled to decide that they do. Sections 9503 and 9504 of the California Commercial Code, which provide for such takings, are therefore constitutionally defective and void.

The departure point for such a conclusion is, of course, the *Sniadach* opinion, and the resolution of the issues posed depends in the first instance on the scope it is to be given. Some courts have interpreted the decision narrowly, and have confined it to its own facts. *See* Burnswick Corporation v. J&P, Inc., 424 F. 2d 100 (10th Cir. 1970); Term Plan, Inc. v. Superior Court, 105 Ariz. 270 (Ariz. Sup. Ct. 1969); Michaels Jewelers v. Handy, 6 Conn. Cir. 103 (Conn. Cir. Ct., App. Div. 1970); Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970).

However, the great weight of authority, both state and federal, has taken a broader approach, seeing in *Sniadach* not a special constitutional rule for wages, but a return of "the entire domain of prejudgment remedies to the longstanding procedural due process principle which dictates that, except in extraordinary circumstances an individual may not be deprived of his life, liberty, or property without notice and hearing." Randon v. Appellate Dept., 5 C.3d 536, 541

(1971). *See also* Blair v. Pitchess, 5 C.3d 258 (1971); Larson v. Fegherston, 44 Wis. 2d 712 (Wis. Sup. Ct. 1969); Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205 (Minn. Sup. Ct. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971); Laprease v. Raymours Furniture, 315 F. Supp. 716 (N.D.N.Y. 1970); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). Indeed the Supreme Court itself has used *Sniadach* as a cornerstone for the general proposition that absent some compelling state interest an individual must be accorded a reasonable opportunity to be heard before he can be deprived of some significant interest by operation of law. *See* Goldberg v. Kelly, 39 U.S. 254 (1970); Boddie v. Connecticut, 401 U.S. 371 (1971); Java v. California Department of Human Resources, 402 U.S. 21 (1971); Bell v. Burson, 402 U.S. 535 (1971). The varied nature of the cases to which the principle has been applied appears to this court a strong indication of the Supreme Court's notion of that decision's scope.

Yet the call of *Sniadach* and its progeny is not absolute. The Supreme Court in rendering its decision was careful to point out that summary procedures may well meet the requirements of due process in extraordinary situations, 395 U.S. 337, 339; and it indicated that were a statute drawn narrowly enough to meet such unusual conditions, it might pass constitutional muster. It has been suggested that since Sections 9503 and 9504 of the California Commercial Code involve only secured transactions between contracting parties they represent a situation in which the prejudgment seizure of goods without a prior hearing is valid, even under *Sniadach*.

This appears to have been the reasoning of the Tenth Circuit in Brunswick Corporation v. J&P, Inc., 424 F.2d 100 (1970), in which the court rejected the debtor's due process argument. Commenting on *Sniadach* the court stated:

> "Sniadach expressly was a unique case involving, 'a specialized type of property presenting distinct problems in our economic system.' That case involved wage garnishment without notice or hearing prior to judgment on a promissory note. It is not in the least comparable to the case here on appeal involving enforcement of a security interest. Appellants have contractually agreed that upon default, their creditor Brunswick '. . . may take immediate possession of said property [collateral] and for this purpose the Seller may enter the premises where said property may be and remove the same without notice or demand, and with or without legal process; thereupon all the rights and interests of the Buyer to and in said property shall terminate.' Appellants admit they were in default on the conditional sale, so they cannot now be heard to object to the default procedures they agreed to simply because Brunswick did utilize the legal process of replevin under bond." 424 F.2d 100, 105.

The contracting parties in the *Brunswick* case were both commercial enterprises, and the property subject to repossession consisted of bowling equipment. This was determined to be of no significance by the Southern District of Florida in Fuentes v. Faircloth, 317 F. Supp. 954 (1970), *jur. noted*, 401 U.S. 906 (1971), a decision which followed closely the reasoning in *Brunswick*, and which is presently being considered by the

Supreme Court. In *Fuentes*, the fact that the contract was between a commercial party and an individual, as opposed to the *Brunswick* situation in which two commercial parties had contracted, was held to be "a distinction without a difference as far as Due Process is concerned." 317 F. Supp. 954, 957. The *Fuentes* court affirmed its belief that prejudgment seizure is justified in certain situations, and that "replevin pursuant to a contract which authorizes a conditional seller to repossess in order to protect his security interest in the goods which are the subject of the contract is one of those situations." 317 F. Supp. 954, 958.

This court takes issue with the reasoning of both these cases on several grounds. First, *Brunswick* was decided prior to Goldberg v. Kelly, *supra*, or any of the other decisions which, as discussed above, serve to clarify the scope of *Sniadach*. The *Brunswick* court, therefore, chose to confine *Sniadach* to its facts, and found it inapplicable to a situation involving a secured transaction in which both parties presumably assented to the terms contained in the agreement. This court, having decided that *Sniadach* is of broader dimensions, does not feel that a statute providing for repossession without notice or hearing is exempt from constitutional scrutiny merely because its operation is confined to situations involving the presence of a contract.

The implication of *Brunswick* is, of course, that the debtor, by entering into the agreement, was placed on notice of the consequences of failure to perform, and that the constitutional right to notice and hearing before the removal of the property was thereby waived. However, the presumption against the waiver of constitutional rights is well settled. Glasser v. United States,

315 U.S. 60 (1942); Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1971), *prob. jur. noted,* 401 U.S. 991 (1971). While a signed contract may represent an effective waiver where the contracting parties are of equal bargaining power, it is clearly not so in all cases, particularly those involving so-called "adhesion contracts," in which the terms are specified by the seller or lender. As noted by the Supreme Court of California in Blair v. Pitchess, *supra:*

> " 'The weaker party, in need of goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntarily to terms dictated by the stronger party; terms whose consequences are often understood only in a vague way, if at all.' (Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract* (1943) 43 Colum. L. Rev. 629, 632.)" 5 C.3d 258, 275-276.

This court is not alone in failing to find an effective waiver of constitutional rights where standard-form contracts are involved. In Swarb v. Lennox, *supra,* the court held that confession of judgment clauses in signed consumer credit agreements and leases by those with incomes under ten thousand dollars did not constitute a waiver of the right to notice and hearing prior to execution on confessed judgments, since in most cases it could not be established that there was an in-

tentional relinquishment or abandonment of a known right or privilege. In Laprease v. Raymours Furniture Co., *supra*, the court in considering a replevin action based on a security agreement stated by way of dictum that, "We question that the fine print in the usual consumers conditional sales contract gives rise to a competent and intelligent waiver of a constitutional right." 315 F. Supp. 716, 724.

In Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970), the court found that written provisions in signed leases permitting a landlord to distrain for rent did not amount to a waiver by the tenant of his right to object on constitutional grounds to the statutory distress procedure. Stated the court:

> "We take judicial notice of the fact that form leases are put before tenants on an 'accept this or get nothing' basis, . . . and that tenants—who need housing—are compelled to sign. There is no freedom of contract—there is merely a freedom to adhere to the terms of the contract written by the landlord." 319 F. Supp. 284, 294.

And finally, in Blair v. Pitchess, *supra*, the California Supreme Court invalidated that state's prejudgment claim and delivery procedures despite the presence of retained title sales agreements and collateral security agreements normally involved in claim and delivery cases. It held "That the mere fact that such clases are exacted in many cases cannot render constitutional the claim and delivery law, which deprives alleged debtors of their right to due process whether or not such a purported waiver has been signed." 5 C.3d 258, 281.

While none of these cases is binding on this court, I find their reasoning persuasive. If the policy underly-

ing the decision in *Sniadach* is to provide some extra modicum of legal protection to those who live on the lower economic margins of our society, it would be illogical for the courts to be dissuaded from applying that policy by the presence of standard-form contracts which often operate most harshly on the poor. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). If the provisions of a contract can legitimize summary repossession, wage garnishment might then be valid on the same theory, as long as a private agreement could be shown. This would fly in the face of the reasoning in *Sniadach*, and is rejected by this court.

One further point which might be raised in this regard is that repossession without judicial process often results in the taking of property not specified as collateral in the security agreement. This is particularly true where the subjects of the seizure are vehicles which may have other items stored inside, as was the case in both situations presently before this court. Assuming *arguendo* that the security agreement did work a valid waiver of the constitutional right to pre-seizure notice and hearing with regard to the named collateral, no such assumption could be made as to the extraneous items, and as to these, the denial of due process is self-evident.

A second area of disagreement with the *Brunswick* and *Fuentes* decisions is the idea that the identity of the parties to the contract is of no significance. The above discussion is predicated on the existence of a standard-form contract between a corporate creditor and an individual. Where, as in *Brunswick*, the parties are both commercial entities, the bargaining power is to some degree equalized, and the purported waiver

of the constitutional right to prior notice and hearing may indeed be effective. However, the California repossession statute presently under consideration is not limited to secured transactions between parties of equal bargaining power. Thus, like the wage-garnishment statute invalidated in *Sniadach*, it is not "narrowly drawn to meet any such unusual condition," 395 U.S. 337, 339, and cannot achieve validity on this basis.

Likewise, the fact that *Brunswick* involved the repossession of bowling equipment is a significant factor not noted in *Fuentes*, and one which further distinguishes the present situation. In *Sniadach*, the property involved was wages, which the Supreme Court acknowledged was a "specialized type of property presenting distinct problems in our economic system." 395 U.S. 337, 340. Other courts have interpreted "specialized type of property" as referring to those goods which, in some vaguely defined way, are essential to the maintenance of day-to-day existence. *See* Santiago v. McElroy, *supra;* Laprease v. Raymours Furniture Co., *supra;* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). It is obvious that the bowling equipment involved in the *Brunswick* case was not the kind of property which the Supreme Court had in mind when it decided *Sniadach*. However, the security interests covered by California Commercial Code, Sections 9503 and 9504 are not confined to items of such a nonessential nature. The subjects of secured transactions are commonly household appliances, furniture, and automobiles, all of which may be considered necessaries for ordinary day-to-day living. Consequently, for this reason also, the statutes in issue fail to meet the test of narrowness established by *Sniadach*.

Thus, even though there may be situations in which Sections 9503 and 9504 would effect no violation of due process, to hold it valid on this basis would constitute extensive re-drafting by this court, and such is not the function of the judiciary. In light of *Sniadach*, then, the statutes providing for summary repossession and sale must be held unconstitutional.

Although such a conclusion appears incumbent on this court given its view of the applicable law, it is reached with no small measure or reluctance. While I applaud any effort to secure for the poor and helpless the enjoyment of their constitutional rights, it is not clear that the present trend of judicial thinking will ultimately have this effect. For those who make an earnest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession. These persons, the ostensible beneficiaries of *Sniadach* and its progeny, stand to suffer substantially in the long run, if sellers and creditors raise their prices and interest rates commensurate with the cost of the judicial process which these decisions make necessary. Further, this court cannot help but note the increasing segment of our population which has deliberately chosen to live on the lower rungs of the economic ladder, whether out of revulsion against the materialism of society or out of a lack of ambition and commitment. For these persons, whether repossession is summary in nature or the result of judicial process will, in most instances, have little significance. Whether or not the benefits of the present decision will prove sufficient to outweigh the possible costs remains to be seen.

Having decided as a matter of law that the prejudgment repossessions herein complained of were executed under color of state law, this court finds no triable issue of fact remaining in these cases. Since defendants acted pursuant to Sections 9503 and 9504 of the California Commercial Code, which have been shown to violate the due process clause of the Fourteenth Amendment, the repossessions must be held illegal. Plaintiffs are entitled to partial summary judgment on this question, and the instant motion is hereby granted.

IT IS SO ORDERED.

Dated: February 11, 1972.

/s/ Leland C. Nielsen,
LELAND C. NIELSEN,
United States District Judge

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APPENDIX

§ 9503. *Secured Party's Right to Take Possession After Default.* Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and many dispose of collateral on the debtor's premises under Section 9504. (Stats.1963, c. 819, § 9503.)

§ 9504. *Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.* (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before dis-

tribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor, and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice giving his address, a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made. Such notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor at his address as set forth in the financing statement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other se-

cured party at the address set forth in his request for notice, at least five days before the date fixed for any public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any party thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this State. If the collateral is located outside of this State or has been removed from this State, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for the sale. The secured party may buy at any public sale and if the collateral is customarily sold in a recognized market or is the subject of widely or regularly distributed standard price quotations he may buy at private sale. Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The

purchaser takes free of all such rights and interest even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings.

(a) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) In any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division. (Stats.1963, c. 819, § 9504.)

APPENDIX D.

Order Dismissing Cause for Lack of Subject Matter Jurisdiction.

In the United States District Court, for the Northern District of California.

Willie O. Hampton and Mattie Hampton, Individually and on behalf of all others similarly situated, Plaintiffs, v. The Bank of California, National Association, a California banking corporation, Defendants. Civil No. 71-1986 SW.

Filed: March 3, 1972.

Plaintiffs brought this action for injunctive and declaratory relief alleging that defendant's repossession of their automobile under a conditional sales contract, as authorized by California Commercial Code Section 9503 and California Civil Code Sections 2982(a)(10)(4), violates their Fourteenth Amendment rights under *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

This court was recently called upon to decide the identical issues in the case of *Oller v. The Bank of America,* No. C-70-2559 SW, decided February 28, 1970, wherein it held that jurisdiction over the subject matter was lacking inasmuch as the requisite "State action" to establish federal jurisdiction cannot be found in the repossession procedure in question.

While no motion to dismiss the instant action for lack of jurisdiction has been filed, the court is obliged to raise the matter *sua sponte. Mansfield, Coldwater & Lake Michigan Railway Company & Another v. Swan & Another,* 111 U.S. 379, 382-386 (1884).

Accordingly, for the reasons set forth in the court's memorandum of decision in *Oller v. Bank of America, supra,* this action is hereby dismissed for lack of jurisdiction over the subject matter.

It is so ordered.

Dated: March 2, 1972.

/s/ Spencer Williams
United States District Judge

APPENDIX E.

Opinion.

In the United States District Court, for the Northern District of California.

Catherine Oller, Individually and on behalf of all other persons similarly situated, Plaintiffs, v. Bank of America, et al., Defendants. No. C-70-2559 SW.

Filed: Feb. 29, 1972.

This matter comes before the Court on a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

Defendant Bank of America initiated a repossession of plaintiff's automobile under the terms of a conditional sales contract covering the purchase and sale of the subject vehicle. The contract was in the form required by the State of California's Automobile Sales Finance Act (California Civil Code § 2981 et seq.) and as required, specifically stated that: "[I]f you default in the performance of your obligation under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement."

The instrument in question is a conditional sales contract within the meaning of the Automobile Sales Finance Act (Civil Code § 2981(a)), and also comes within the definition of a "secured transaction" as used in the Uniform Commercial Code (California Commercial Code § 9102(2)). The California Commercial Code specifically provides, insofar as secured transactions are concerned, that: "Unless otherwise agreed, a secured party has on default the right to take pos-

session of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace, or may proceed by action." (California Commercial Code § 9102(2)). The California Commercial Code specifically provides, insofar as secured transactions are concerned, that: "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace, or may proceed by action." (California Commercial Code § 9503). While the right to repossess is specifically authorized by the above quoted sections, it had long been a commonly accepted contractually-based and judicially-sanctioned practice prior to such statutory authorization (See California Code, Comment to Commercial Code § 9501).

Plaintiff has attacked the authority of the Bank to repossess in a complaint for declaratory relief, claiming jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1220. Essentially, the claim is based on § 1343(3) which provides that District Courts shall have original jurisdiction of civil actions to redress the deprivation of a right privileged or immunity secured by the Constitution or any Federal statute providing for equal rights of citizens, when such deprivation is accomplished "under color of any State law." 42 U.S.C. 1983 is the statute relied upon to give such a claim for relief. It states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proceeding for redress."

In order to establish jurisdiction, therefor, the plaintiff must demonstrate that the action in question was "under color of State law" and also that such action deprives the plaintiff of a right, privilege or immunity secured by the Constitution of the United States.

It is plaintiff's contention that the Bank's repossession under the authority of the California Commercial Code Sections constitutes an action under color of State law and that such actior deprives her of a constitutionally protected right to notice and a chance to be heard prior to the taking of the vehicle. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The Court is not persuaded that the law supports either contention. Disposal of the first, however, obviates the necessity of reaching the second.

The requirement of "State action" can rarely be satisfied when the action is taken by one not a State official, *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1965). While difficult factual situations have compelled some courts to enunciate extensions of this general rule, in every such case brought to the court's attention, either a state official was acting in concert with a private individual, *Adickes v. Kress*, 398 U.S. 144 (1969); *Williams v. U.S.*, 341 U.S. 97 (1950); *Shelley v. Kraemer*, 334 U.S. 1, or the State law compelled such action, *Harrison v. Murphy*, 205 F.Supp. 449 (D. Del. 1962); *Williams v. Hot Shoppes*, 293 F.2d 835 (D.C. Cir. 1961), or the power exercised was purely of statutory as distinguished from com-

mon law or contractual origin. *DeCarlo v. Horne & Co.*, 251 F.Supp. 935 (W.D. Pa. 1966); *Klim v. Hones*, 315 F.Supp. 109 (N.D. Cal. 1970).

No such exceptional factors exist to compel a similar extension of the rule in the instant case. The Bank is not a governmental or even quasi-governmental agency; no government official acts with the Bank in the matter of repossession; the act of repossession is not compelled; the authority to repossess is based on a contractual right which had been judicially approved prior to the adoption of the statutes in question.

What we have here is a private act taken by a private organization to protect its security interest in personal property that is subject to a conditional sales contract. The courts have been almost unifo.m in refusing to color such transactions as "State actions". See *McCormick v. First Nat'l Bank of Miami*, 322 F.Supp. 604 (S.D. Fla. 1971). It is difficult to imagine any statutory provision that does not, in some way, control human relationships. To say, as plaintiff seems to contend, that all human behavior which conforms to statutory requirements is "State action" or is "under color of State law" would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well.

The Court's attention has been drawn to the recent decision by the District Court for the Southern District of California wherein the identical questions posited here were resolved in favor of the plaintiff. *Adams v. Egley, et al.*, Civil No. 70-345-N, S.D. Cal., filed February 11, 1972. While this court gives great deference to the carefully considered opinion in that case, it

respectfully declines to take a step in the same direction. In particular, the court believes that reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1966) for resolution of the jurisdictional question is misplaced. *Reitman*, which dealt with racial discrimination in violation of the due process clause, clearly presented a compelling factual situation to which the Civil Rights Acts and their jurisdictional counterparts were designed to apply. The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case.

Accordingly, defendant's motion to dismiss this action for lack of jurisdiction should be and hereby is granted.

So ordered.

Dated: February 28, 1972.

/s/ Spencer Williams
United States District Judge

APPENDIX F.

U.S. Constitution, Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Statutes Section 1979.
United States Code.
Title 42.

§ *1983. Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunies secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Business and Professions Code.

§ *7520. Necessity of license.* No person shall engage in a business regulated by this chapter; act or assume to act as; or represent himself to be a licensee unless he is licensed under this chapter; and no person shall falsely represent that he is employed by a licensee.

§ *7521. Classes of business defined; restrictions on operations of patrol officer or repossessor*

(e) A repossessor within the meaning of this chapter is a person who, for any consideration whatsoever, engages in business or accepts employment to locate or recover personal property, including but not limited to personal property registered under the provisions of the Vehicle Code, which has been sold under a conditional sales agreement or which is subject to a chattel mortgage . . .

§ *7522. Persons exempted*

This chapter does not apply to: . . .

(i) The legal owner of personal property which has been sold under a conditional sales agreement or a mortgagee under the terms of a chattel mortgage.

(j) Any bank subject to the jurisdiction of the Superintendent of Banks of the State of California or the Comptroller of Currency of the United States . . .

§ *7538.2 Inventory of personal property; date; filing; falsification or alteration.* If personal effects or other personal property, not covered by a conditional sales agreement or by a chattel mortgage, are contained in or on personal property, at the time it is recovered, a complete and accurate inventory shall be made of such personal effects or other personal property. The date and time the inventory is made shall be indicated and it shall be signed by the person or persons who recovered the personal property on behalf of the legal owner or mortgagee. The inventory shall be filed in the permanent records of the licensee and shall be made available to the director or his representatives upon demand during normal business hours. Falsification or

alteration of an inventory shall be grounds for suspension or revocation of a license.

California Civil Code.

§ 2982. *Formalities of conditional sales contracts*

(a) Form; signatures; delivery of copy of contract; contents.

(a) Every conditional sale contract for sale of a motor vehicle, with or without accessories, shall be in writing and, if printed, shall be printed in type no smaller than six point, and shall contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness. The conditional sale contract or a purchase order shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and an exact copy thereof shall be furnished the buyer by the seller at the time the buyer and the seller have signed the contract or purchase order. No motor vehicle shall be delivered under this chapter until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order and any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign, and which he has signed, during the contract negotiations. The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed. Every conditional sale contract shall contain, although not necessarily in the sequence or order set forth below, the following separate items:

. . .

10. A notice, in at least eight-point bold type if the contract is printed, reading as follows: "Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement."

§ 2983.2 Notice of Intent to sell repossessed motor vehicle; form; prerequisite to liability for delinquency

Any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, at least 10 days' written notice of intent to sell a repossessed motor vehicle must be given to all persons liable on the contract. The notice shall be *personally served* or shall be sent by *certified* mail, *return receipt requested,* directed to the address of the persons shown on the contract, unless such persons have notified the holder in writing of a different address. The notice shall set forth that there is a right to redeem the motor vehicle and the total amount required as of the date of the notice to redeem; may inform such persons of their privilege of reinstatement of the contract, if the holder extends such privilege; shall give notice of the holder's intent to resell the motor vehicle at the expiration of *10* days from the date of giving or mailing the notice, or if given by mail and either the place of deposit in the mail or the place of

address is outside of this state, the period of notice shall be *20* days instead of *10* days; shall disclose the place at which the motor vehicle will be returned to the buyer upon redemption or reinstatement; and shall designate the name and address of the person to whom payment shall be made. During the period provided under said notice, the person or persons liable on the contract may pay in full the indebtedness evidenced by the contract. Such persons shall be liable for any deficiency after sale of the repossessed motor vehicle only if the notice prescribed by this section is given within 60 days of repossession and includes the following:

1. A notice, in at least eight-point bold type if the notice is printed, reading as follows: "Notice: You are subject to suit and liability if the amount obtained upon sale of the vehicle is insufficient to pay the contract balance and any other amounts due."

2. An itemization of the contract balance and of any delinquency, collection or repossession costs and fees. In addition, the notice shall either set forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice or shall state that such a credit may be available against the amount due.

§ 2983.3 Default as prerequisite to repossession or acceleration of maturity

In the absence of default by the buyer in the performance of any of his obligations under the contract, the holder may not accelerate the maturity of any part or all of the amount owing thereunder or repossess the motor vehicle.

California Commercial Code.

§ *9501. Default; Procedure When Security Agreement Covers Both Real and Personal Property.* (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this chapter and except as limited by subdivision (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9207. The rights and remedies referred to in this subdivision are cumulative. . . .

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to redemption of collateral (Section 9506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable: . . .

(b) Subdivision (3) of Section 9504 which deals with disposition of collateral;

§ *9503. Secured Party's Right to Take Possession After Default.* Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require

the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504.

§ *9504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.* (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is

liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

California Vehicle Code.

§ *28. Notification of repossession*

Whenever possession is taken of any vehicle by or on behalf of any legal owner thereof under the terms of a security agreement or lease agreement, the person taking possession shall immediately notify by the most expeditious means available the city police department where such taking of possession occurred, if within an incorporated city, or the sheriff's department of the county where such taking of possession occurred, if outside an incorporated city, and shall within 24 hours forward a written notice to such department.

§ *5600 Transfer requirements*

No transfer of the title or any interest in or to a vehicle registered under this code shall pass, and any attempted transfer shall not be effective, until the parties thereto have fulfilled either of the following requirements:

(a) The transferor has made proper endorsement and delivery of the certificate of ownership and delivery of the registation card to the transferee as provided in this code and the transferee has delivered to the department or has placed the certificate and card in the United States mail addressed to the department when and as required under this code with the proper transfer fee, together with the amount required to be paid under Part 1 (commencing with Section 6001),

Division 2 of the Revenue and Taxation Code with respect to the use by the transferee of the vehicle, and thereby makes application for a transfer of registration except as otherwise provided in Sections 5905, 5906, 5907, and 5908.

(b) The transferor has delivered to the department or has placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of the vehicle pursuant to the sale or transfer except as provided in Section 5602.

§ *5601. Involuntary transfer*

Section 5600 does not apply to involuntary transfers, as upon the taking of possession by a secured party under a security agreement, or to transfers involving the creation of security interests subject to Chapter 3, commencing at Section 6300.

§ *5602. Requirements for releasing liability*

An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of the vehicle so as to be subject to civil liability for the operation of the vehicle thereafter by another when the owner in addition to the foregoing has fulfilled either of the following requirements:

(a) When he has made proper endorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

(b) When he has delivered to the department or has placed in the United States mail, addressed to the department, either the notice as provided in Section 5900

or Section 5901 or appropriate documents for registration of the vehicle pursuant to the sale or transfer.

§ *5909. Involuntary transfers*

(a) Whenever the title or interest of any owner or legal owner in or to a vehicle registered under this code passes to another otherwise than by voluntary transfer the new owner or legal owner may obtain a transfer of registration upon application therefor and upon presentation of the last certificate of ownership and registration card issued for the vehicle, if available, and any instruments or documents of authority or certified copies thereof as may be required by the department, or required by law, to evidence or effect a transfer of title or interest in or to chattels in such case.

(b) The department when satisfied of the genuinenes and regularity of the transfer shall give notice by mail to the owner and legal owner of the vehicles as shown by the records of the department and five days after the giving of the notice, if still satisfied of the genuineness and regularity of such transfer, shall transfer the registration of the vehicle accordingly. Such notice shall not be required for a transfer described in Section 5601.

§ *9561. Waiver of penalties on respossessed vehicle*

When a legal owner or his agent repossesses a vehicle on which renewal fees are due, the department shall waive any penalties that are due for late payment if all other fees are paid within 30 days of taking possession.

APPENDIX G.

In addition to the cases cited at pp. 8-9, *infra* are the following decisions. Finding state action are: *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D.Mass. 1973); *Michel v. Rex-Noreco, Inc.*, 12 UCC Rep. Serv. 543 (D. Vt. 1972); *Chrysler Credit Corp. v. Dinitz*, 11 UCC Rep. Serv. 627 (N.Y. Civ. Ct. 1972); *Contra. Kirksey v. Thelig*, 351 F. Supp. 727 (D. Colo. 1972); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973); *Shelton v. General Electric Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Johnson v. Associates Finance, Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973); *Calderon v. United Furniture Co.*, 371 F. Supp. 572 (S.D. Tex. 1973); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Lopez v. Inman Furniture*, No. 73-B-31 (S.D. Tex. Dec. 17, 1973); *Sanderson v. Chrysler Credit Corp.*, No. 7517-73-H (S.D. Ala., July 17, 1973); *Kasey v. Alban Motors*, No. 7493-A (W.D. Ky., Nov. 27, 1973); *Colvin v. Avco Fin'l Servs., Inc.*, 12 UCC Rep. Serv. 25 (D. Utah 1973); *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. Sup. Ct. 1973); *Brown v. United States Nat'l Bank*, 96 Ore. Adv. Sheets 1667, 509 P.2d 442 (1973); *Giglio v. Bank of Del.*, 12 UCC Rep. Serv. 934 (Del. Ch. Ct. 1973); *Plante v. Industrial Nat'l Bank*, 12 UCC Rep. Serv. 739 (R.I. Super. Ct. 1973) (by implication); *General Motors Accept. Corp. v. Waters*, Civil No. F-71795 (Gen. Sess. Ct., Davidson County, Tenn., Apr. 19, 1973); *Bryant v. United Cal. Bank*, Civil No. 10685 (Cal.

Super. Ct., Los Angeles, Mar. 1, 1973); *Preciado v. Budget Fin. Plan, Inc.*, Civil No. SM 8675 (Cal. Super. Ct. 1973) (by implication); *General Motors Accept. Corp. v. Waters*, Civil No. F-71795 (Gen. Ct., Los Angeles, Sept. 14, 1973); *Wells Fargo Bank v. Rubin*, Civil No. 949,635 (Cal. Super. Ct., Los Angeles, June 22, 1972); *Davis v. Kenneth Chevrolet*, Civil No. 998,821 (Cal. Super. Ct., Los Angeles 1972); *Stevenson v. State Fin. Adjustors*, Civil No. 39027 (Cal. Super. Ct., San Luis Obispo 1972) (by implication); *Sanders v. Crocker-Citizens Nat'l Bank*, Civil No. 258,755 (Cal. Super. Ct., Santa Clara 1972); *Kipp v. Cozens*, Civil No. P-22038 (Cal. Super. Ct., Santa Clara, June 27, 1972), *reprinted in part at* 11 UCC Rep. Serv. 1067; *Universal C.I.T. Credit Corp. v. Keller Enterprises*, Civil No. 146,371 (Cal. Super. Ct., Fresno, Sept. 5, 1973); *King v. South Jersey Nat'l Bank*, Civil No. C-1609-71 (N.J. Super. Ct., Dec. 13, 1972); *Messenger v. Sandy Motors, Inc.*, 4 CCH Sec. Tr. Guide ¶ 51,952 (N.J. Super. Ct. 1972); *Frost v. Mohawk Nat'l Bank*, 347 N.Y.S.2d 246 (N.Y. Sup. Ct. 1973) (by implication); *Yankwitt v. Franklin Nat'l Bank*, 12 UCC Rep. Serv. 1254 (N.Y. Dist.Ct., Nassau, July 9, 1973); *McCarter v. National Bank of Detroit*, No. 73-244-613 CZ (Circuit Ct. Wayne Cty., Mich., Jan. 28, 1974). Many of these cases involve interlocutory rulings by the court on procedural matters and are not expressed in written opinions.